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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 587

CONSOLIDATED TEXTILE CORPORATION,
APPELLANT,

vs.

JOHN J. GREGORY, JUDGE OF THE CIRCUIT
COURT OF MILWAUKEE COUNTY

APPEAL FROM THE SUPREME COURT OF THE STATE OF
WISCONSIN

FILED DECEMBER 31, 1932

(37,284)

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INDEX

	Original	Print
Proceedings in supreme court of Wisconsin	1	1
Petition for appeal	1	1
Order allowing appeal	3	1
Bond on appeal (omitted in printing)	5	
Citation and service (omitted in printing)	13	
Assignments of error	16	2
Praecipe for transcript of record (omitted in printing)	44	
Caption	48	4
Petition for writ of prohibition	49	4
Exhibit "A"—Summons, circuit court	57	9
"B"—Complaint	58	10
"C"—Affidavit of Frederick K. Rupprecht	61	12
"D"—Affidavit of Walter L. Gold	67	17
"D-1"—Affidavit of Morris Karon	74	23
"E"—Order denying motion to dismiss	75	24
"F"—Order granting defendant time in which to enter general appearance, etc	76	25

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	Original	Print
Alternative writ of prohibition	78	26
Motion to quash alternative writ....(omitted in printing)..	86	
Admission of service.....(omitted in printing)..	87	
Return of John J. Gregory, judge of circuit court.....	89	32
Motion to withdraw motion to quash (omitted in printing)	95	
Affidavit of Morris Karon.....(omitted in printing)..	96	
Stipulation as to withdrawal of motion to quash, etc.....	99	36
Minute entry of argument and submission.....	100	37
Judgment	101	37
Opinion, Fairchild, J.....	103	38
Order amending mandate.....	111	44
Clerk's certificate.....(omitted in printing)..	112	
Statement of points to be relied upon and stipulation as to printing record.....	113	44

[fols. a & 1 & 2]

IN SUPREME COURT OF WISCONSIN, AUGUST TERM, 1932

State No. 22

STATE ex Rel. CONSOLIDATED TEXTILE CORPORATION, a Corporation, Petitioner,

vs.

JOHN J. GREGORY, Judge of the Circuit Court of Milwaukee County, Respondent

PETITION FOR APPEAL—Filed Dec. 6, 1932

To the Honorable M. B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin:

Consolidated Textile Corporation, your petitioner, who is the petitioner in the above entitled cause, prays that it may be permitted to take an appeal from the judgment entered in the above entitled cause on the 9th day of November, 1932, to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, be sent to the Supreme Court of the United States under the rules of such court in such case made and provided.

Dated December 6, 1932.

George B. Hudnall, Louis A. Lecher, Frank L. McNamara, Sml. O. Arnold, Attorneys for Petitioner.

[File endorsement omitted.]

[fols. 3 & 4] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER ALLOWING APPEAL—Filed Dec. 6, 1932

The petition of the Consolidated Textile Corporation, petitioner in the above entitled cause, for an appeal from the final judgment denying a writ of prohibition hereto-

fore filed and rendered herein on the 9th day of November, 1932, is hereby granted, and the appeal is allowed; the amount of the appeal bond being hereby fixed at the sum of Two Hundred Fifty Dollars ($250.00), with surety to be approved by the Court or a Judge thereof.

Dated this 6 day of December, 1932.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal Supreme Court of Wisconsin.)

[File endorsement omitted.]

[fols. 5-12] Bond on appeal for $250.00, approved and filed December 6, 1932, omitted in printing.

[fols.13-15] Citation, in usual form, showing service on Walter L. Gold et al., filed December 6, 1932, omitted in printing.

[fol. 16] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Dec. 6, 1932

The petitioner, in connection with its petition for appeal herein, presents and files therewith its assignment of errors as to such matters and things it says that the judgment of the court herein on the 9th day of November, 1932, is erroneous, to-wit:

First. The court erred in holding that § 262.09 (13) of the Statutes of the State of Wisconsin is constitutional.

Second. The court erred in failing to hold that § 262.09 (13) of the Wisconsin Statutes is unconstitutional in that it deprives the petitioner of its property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution.

Third. The court erred in holding that the courts in the State of Wisconsin may constitutionally obtain jurisdiction over an unlicensed foreign corporation which does not do business in the State of Wisconsin by service of process on an officer of such corporation who is temporarily in the state for the purpose of compromising a suit at law instituted against the corporation in a sister state, as provided by § 262.09 (13) of the Wisconsin Statutes.

[fols. 17-43] Fourth. That the court erred in holding that the courts in the State of Wisconsin may constitutionally obtain jurisdiction over an unlicensed foreign corporation which does not do business in the State of Wisconsin by service of process on an officer of such corporation who is temporarily in the state for the purpose of compromising a suit at law instituted against the corporation in a sister state where the cause of action sued upon is one which arose out of a transaction outside of the State, as provided by § 262.09 (13) of the Wisconsin Statutes.

Fifth. That the court erred in failing to hold that the doing of interstate business by an unlicensed foreign corporation, the entire stock of which is owned by an unlicensed foreign corporation, does not constitute the doing of business by such parent corporation in such state, and in failing to hold that § 262.09 (13) of the Wisconsin Statutes, which authorizes service to be made on an officer of such unlicensed foreign corporation, is unconstitutional in that it deprives the petitioner of its property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution.

Wherefore Petitioner prays that the said judgment may be reversed and for such other and further relief as to the Court may seem just and proper.

Dated December 6, 1932.

George B. Hudnall, Louis A. Lecher, Frank L. McNamara, Sml. O. Arnold, Attorneys for Petitioner.

Presented and filed this 6 day of December, 1932.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal Supreme Court of Wisconsin.)

[fols. 44-47] Here appears præcipe for transcript on appeal, together with admission of service.

[fol. 48] Pleas Before the Supreme Court of the State of Wisconsin at a Term Thereof Begun and Held at the Capitol, in Madison, the Seat of Government of said State, on the Second Tuesday, to wit, the 9th Day, of August, A. D. 1932

Present: Hon. Marvin B. Rosenberry, Chief Justice; Hon. Walter C. Owen, Hon. Chester A. Fowler, Hon. Oscar M. Fritz, Hon. Edward T. Fairchild, Hon. John D. Wickhem, Hon. George B. Nelson, Justices; Arthur A. McLeod, Clerk.

Be it remembered that heretofore, to-wit: on the thirty-first day of August, in the year of our Lord One Thousand Nine Hundred and Thirty-Two came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the Consolidated Textile Corporation, by its attorneys, and filed in said Court its certain application for leave to file a petition for writ of prohibition, according to the statute in such case made and provided, and demurrer to the return of the Honorable John J. Gregory, Judge of the Circuit Court of Milwaukee County, in said State, in words and figures following, that is to say:

[fol. 49] [File endorsement omitted]

In Supreme Court of Wisconsin

State ex Rel. Consolidated Textile Corporation, a Corporation, Petitioner,

vs.

John J. Gregory, Judge of the Circuit Court of Milwaukee County, Respondent

Petition for Writ of Prohibition—Filed Sept. 27, 1932

To the Honorable the Supreme Court of the State of Wisconsin:

The petition of the Consolidated Textile Corporation respectfully alleges:

(1) That your petitioner is a corporation organized under the laws of the State of Delaware with its office and

principal place of business in the city, county and state of New York.

(2) That Frederick K. Rupprecht is the President of your petitioner, and is a resident of the city, county and state of New York.

(3) That on the 14th day of January, 1932, a summons, a copy of which, marked exhibit "A", is hereto annexed and forms a part hereof as if fully set forth herein, was served on Frederick K. Rupprecht, whereby your petitioner was summoned to appear in the Circuit Court for Milwaukee County to answer the plaintiff's complaint, copy of which, marked exhibit "B", is hereto annexed and forms a part hereof as if fully set forth herein.

[fol. 50] (4) That in pursuance to said summons, your petitioner, by Bottum, Hudnall, Lecher, McNamara & Michael, its attorneys, appearing specially for the sole purpose of moving to vacate and set aside the service of the summons and to dismiss said action on the ground that the Court did not have jurisdiction over said action and on the 13th day of February, 1932, attended before the Court and moved to vacate and set aside the service of the summons and to dismiss said action on the ground that the Court had no jurisdiction over said action for the following reasons: That your petitioner was a corporation organized and existing under and by virtue of the laws of the State of Delaware; that it was not licensed to do business in the state of Wisconsin; that it had not in fact done business in the state of Wisconsin, and that it had no property or place of business or office or agent in the state of Wisconsin; that Frederick K. Rupprecht, president of your petitioner, was a resident of the city, county and state of New York; that service of said summons on the said Frederick K. Rupprecht was made while he was temporarily within the city and county of Milwaukee and state of Wisconsin; all of which said facts and circumstances were more particularly set forth in the affidavit of the said Frederick K. Rupprecht which is now on file in the Circuit Court for Milwaukee County, and constituted a part of the motion of your petitioner to vacate and set aside the service of the summons and to dismiss said action, copy of which affidavit marked exhibit "C" is attached hereto and forms a part

hereof as if fully set forth herein; that the service of summons on a foreign corporation was controlled by the Stat-
[fol. 51] utes of the State of Wisconsin; that the only Statute in Wisconsin which in any manner might authorize service of said summons was Subsection (13) of Section 262.09 of the Wisconsin Statutes; that the service of said summons was not authorized under Subsection (13) of Section 262.09 of the Wisconsin Statutes; that if the service of said summons was authorized under Subsection (13) of Section 262.09 of the Wisconsin Statutes, said Subsection (13) of Section 262.09 of the Wisconsin Statutes was unconstitutional in that it deprived your petitioner of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States; that the service of said summons under the said circumstances, as hereinbefore related, deprived your petitioner of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

(5) That the plaintiff in said action in opposition to said motion to vacate and set aside the service of summons and to dismiss said action, filed affidavits of Walter L. Gold and Morris Karon, which said affidavits are now on file in the Circuit Court for Milwaukee County, as a part of the file in said action, copies of which affidavits marked respectively Exhibit "D" and Exhibit "D-1" are attached hereto and form a part hereof as if fully set forth herein; that said affidavits are made a part of this petition at the request of the attorneys representing the plaintiff in said action to obviate the necessity of filing a return to the alternative writ of prohibition to be issued hereunder by the Supreme Court.

(6) That the sole purpose of the said Frederick K. Rupprecht in coming to Milwaukee on the said 14th day of January, 1932, was to confer with the said Walter L. Gold [fol. 52] and was not for the purpose of transacting business for your petitioner; that the said Frederick K. Rupprecht did not on the 14th day of January, 1932, or at any other time, confer with Gimbel Brothers in the city of Milwaukee or state of Wisconsin, or with any other mercantile establishment in the city of Milwaukee.

(7) That your petitioner has not at any time transacted any business in Wisconsin in any manner whatsoever; that the Consolidated Selling Company is a corporation organized under the laws of the state of Delaware with its office and principal place of business in the city, county and state of New York; that your petitioner owns all of the stock of the said Consolidated Selling Company; that said Consolidated Selling Company is not licensed to do business in the state of Wisconsin and that the only business conducted by the Consolidated Selling Company in Wisconsin is interstate in character and is conducted by means of nonresident agents who solicit orders in Wisconsin which are accepted in New York City.

(8) That the cause of action set forth in the plaintiff's complaint, a copy of which marked Exhibit "B" is attached hereto and forms a part hereof, shows upon its face that the cause of action therein alleged, arose out of a transaction outside the state of Wisconsin; that the said bonds referred to in said complaint were a portion of an issue of twenty year eight percent sinking fund convertible gold bonds which were issued by your petitioner; that the principal and interest on the said bonds are payable at the principal office of the Chase National Bank in the city, [fol. 53] county and state of New York; that no part of the transaction in which said bonds were issued by your petitioner took place in the state of Wisconsin; that if Subsection (13) of Section 262.09 of the Statutes authorized service on your petitioner, Subsection (13) of Section 262.09 violates the Fourteenth Amendment to the Federal Constitution by depriving your petitioner of its property without due process of law.

(9) That the said action in which the said Katherine Gold is plaintiff and Consolidated Textile Corporation is defendant, is one of seven actions now pending in the Circuit Court for Milwaukee County for the recovery of principal and interest on bonds issued by your petitioner, and in which your petitioner is defendant; that the names of the plaintiffs in said actions are as follows: Cecilia Alshuler, Blanche Oster, Lillie Mock, Walter L. Gold, Gold Realty Company, a corporation, and Central Holding Company, a corporation; that pursuant to agreement with coun-

sel representing said plaintiffs, the decision of this Court in this proceeding shall be controlling in all of said actions.

(10) That the hearing on said motion to vacate and set aside the service of said summons and to dismiss said action was postponed from time to time until the 9th day of April, 1932, at which time said motion was argued before the said Circuit Court for Milwaukee County in that branch presided over by the Hon. John J. Gregory, Circuit Judge presiding.

(11) That the said the Hon. John J. Gregory, notwithstanding said motion and objection, did proceed to hear said cause and refuse to dismiss the same, and on or about the 30th day of June, 1932, decided that he had jurisdiction over said action and on said day entered an order, a copy of which marked Exhibit "E," is annexed hereto and forms a part hereof as if fully set forth herein, dismissing the said motion of your petitioner to vacate and set aside the service of said summons and to dismiss said action; that [fol. 54] thereafter and on the 1st day of July, 1932, judgment was entered in favor of the plaintiff and against the defendant, your petitioner, as prayed for in said complaint; that neither your petitioner nor its said attorneys, Bottum, Hudnall, Lecher, McNamara & Michael, had knowledge or notice of said order dated June 30, 1932, or of said judgment dated July 1, 1932, until the 12th day of July, 1932, at which time the attorneys for the plaintiff served notice of entry of order and notice of entry of judgment on the attorneys for your petitioner; that immediately thereafter said attorneys for the Consolidated Textile Corporation communicated with the Honorable John J. Gregory, Circuit Judge, who was on his vacation at Sayner, Wisconsin, requesting said Judge to sign an order to show cause why a rehearing and review of said order of June 30, 1932 should not be granted; that on the 28th day of July, 1932, an order to show cause signed by the said the Honorable John J. Gregory, returnable on the 29th day of August, 1932, the date on which said Judge would return from his said vacation, was served on the attorneys for the plaintiff; that on the 29th day of August, 1932, said order to show cause came on to be heard before the Circuit Court for Milwaukee County, the said Honorable John J. Gregory, Circuit Judge, presiding, who thereupon announced in open Court

his decision that by reason of the fact that neither your petitioner nor its said attorneys had knowledge or notice of said order of June 30, 1932, prior to the entry of the judgment on July 1, 1932, the Court on its own motion would set aside said judgment of July 1, 1932, and would stay entry of Judgment for a period of five (5) days thereafter to permit your petitioner to enter a general appearance, to demur, to answer or otherwise plead to the Plaintiff's com-[fol. 55] plaint; that on the 30th day of August, 1932, an order was entered in accordance with the said oral decision of the said Court, a copy of which marked Exhibit "F" is hereto annexed and forms a part hereof as if fully set forth herein; that pursuant to said order your petitioner was required to make a general appearance, to demur, to answer or otherwise plead to the plaintiff's complaint on or before September 6th, 1932, or in the alternative to permit judgment to go against your petitioner by default.

(12) That your petitioner has no speedy or adequate remedy by appeal or otherwise.

Wherefore your petitioner prays that this Court issue its writ of prohibition commanding said Court to desist from any further proceedings in said action.

Consolidated Textile Corporation, Petitioner. Bottum, Hudnall, Lecher, McNamara & Michael, Attorneys for Petitioner.

[fol. 56] *Duly sworn to by F. K. Rupprecht. Jurat omitted in printing.*

[fol. 57] EXHIBIT "A" TO PETITION

STATE OF WISCONSIN:

CIRCUIT COURT, MILWAUKEE COUNTY

KATHERINE GOLD, Plaintiff,

vs.

CONSOLIDATED TEXTILE CORPORATION, Defendant

Summons

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of serv-

ice, and defend the above entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint; of which a copy is herewith served upon you.

Gold and McCann, Plaintiff's Attorneys.

P. O. Address: 625-630 Caswell Block, 152 W. Wisconsin Ave., Milwaukee, Milwaukee County, Wis.

[Endorsed:] Summons.

[fol. 58] EXHIBIT "B" TO PETITION

STATE OF WISCONSIN,
Milwaukee County:

CIRCUIT COURT

KATHERINE GOLD, Plaintiff,

vs.

CONSOLIDATED TEXTILE CORPORATION, Defendant

Now comes the above named plaintiff by Gold and McCann, her attorneys, and for a complaint against the defendant alleges and shows unto the court as follows:

First Cause of Action

1. Plaintiff at all times hereinafter mentioned was and now is a citizen and resident of the city and county of Milwaukee, Wisconsin.

2. Defendant at all times hereinafter mentioned was and now is a foreign corporation duly organized and existing under and by virtue of the laws of the state of Delaware.

3. That on June 1, 1921, the defendant, for value received, by its proper officers and agents, made, executed and delivered its first mortgage twenty-year 8% sinking fund convertible gold bonds numbered M3908 for One Thousand ($1000) Dollars, and D147, D916 and D1289, each D numbered bond for the principal amount of Five Hundred ($500) Dollars, bearing date June 1, 1921, payable to bearer twenty years after said date at the principal office of the Chase National Bank in the city of New York, state of New York, with interest thereon at the rate of eight per

cent per annum payable semi-annually on the first days of June and December of each year commencing with December 1, 1921, and defendant promised to pay all such bonds at maturity and the interest thereon evidenced by interest [fol. 59] coupons attached to said bonds, as they become due.

4. That plaintiff is the owner and holder of said bonds in due course for value, together with the interest coupons attached thereto numbers 20 to 40 inclusive, coupons number 20 being for the interest in the total sum of One Hundred ($100) Dollars, which became due on June 1, 1931 and coupons number 21 being for interest which became due on December 1, 1931 in the sum of One Hundred ($100) Dollars.

5. That due demand has been made for the payment of coupons numbers 20 and 21 on each bond for the total sum of Two Hundred ($200) Dollars upon maturity of each of said coupons, but defendant has refused and neglected to pay said interest coupons or any part thereof and there is now due and owing thereon from the defendant to the plaintiff the sum of Two Hundred ($200) Dollars, with interest on each coupon at the rate of six (6%) per cent per annum from the date each coupon became due as aforesaid.

Second Cause of Action

1. Plaintiff realleges with the same force and effect as if fully set forth at length herein all the allegations of paragraphs 1 to 4 inclusive of the first cause of action.

2. That defendant has, after due demand, refused and neglected to pay the interest on the said bonds which became due on June 1, 1931, and the interest on said bonds which became due on December 1, 1931. On information and belief, upon default in the payment of interest at any time the holder of a bond may declare the entire amount of principal on his bond due and payable. That plaintiff has declared the full amount of the principal of the said bonds due and payable, and has demanded payment of the principal of said bonds from the defendant, but payment thereof has been refused. That there is now due and owing from the defendant to the plaintiff on the principal of said bonds the sum of Two Thousand Five Hundred ($2,500)

[fol. 60] Dollars with interest thereon at the rate of eight per cent from December 1, 1931.

Wherefore plaintiff prays judgment against the defendant on the first cause of action for the sum of Two Hundred ($200) Dollars with interest thereon at the rate of six (6%) per cent per annum on One Hundred ($100) Dollars from June 1, 1931 and with interest thereon at the rate of six (6%) per cent per annum on One Hundred ($100) Dollars from December 1, 1931 and on the second cause of action in the sum of Two Thousand Five Hundred ($2,500) Dollars, with interest at the rate of eight (8%) per cent per annum from December 1, 1931, together with the costs and disbursements of this action.

Gold and McCann, Attorneys for Plaintiff.

State of Wisconsin,
Milwaukee County, ss:

Katherine Gold, being first duly sworn on oath, deposes and says that she is the plaintiff in the above entitled action; that she has read the foregoing complaint and knows the contents thereof and the same is true to her own knowledge.

——— ———.

Subscribed and sworn to before me this — day of January, 1932. ——— ———, Notary Public, Milwaukee County, Wisconsin.

[fol. 61] Exhibit "C" to Petition

State of Wisconsin,
Milwaukee:

Circuit Court

Walter L. Gold, Plaintiff,

against

Consolidated Textile Corporation and Frederick K. Rupprecht, Defendants

State of New York,
County of New York, ss:

Frederick K. Rupprecht, being duly sworn, deposes and says:

1. That he resides in the City, County and State of New York, and is a resident and citizen of said State, and that he is President of the above named defendant, Consolidated Textile Corporation.

2. That said defendant, Consolidated Textile Corporation, is a corporation organized and existing under the laws of the State of Delaware.

3. That said defendant, Consolidated Textile Corporation, is not licensed to do business in the State of Wisconsin, that it has not in fact done business in said State and has no property or place of business, or office or agent in said State.

4. That service of the summons on the deponent personally and on the defendant corporation in this action was attempted to be made upon deponent while he was temporarily in the State of Wisconsin as hereinafter more fully set forth, for the purpose of conferring with Mr. Walter L. Gold, the plaintiff in this action and the person who verified the complaint herein, with reference to an action brought against the defendant Corporation to recover in-
[fol. 62] terest due December 1, 1930, on $9,200 principal amount of the First Mortgage Bonds issued by the defendant Corporation, including bonds alleged to be owned by plaintiff and bonds alleged to be owned by others represented by him as attorney.

5. That deponent was not in the State of Wisconsin for the purpose of transacting business generally for the defendant Corporation in the State of Wisconsin but solely for the purpose of conferring with the said Walter L. Gold as aforesaid, and as more fully set forth hereinafter, and that deponent did not, by going into the State of Wisconsin, submit or intend to submit to the jurisdiction of said State for the purposes of an action or suit against the defendant Corporation or against deponent individually.

6. That the facts relating to the presence of deponent in the State of Wisconsin and the attempted service upon him in this action are as follows:

That said Walter L. Gold represents as attorney the alleged owners of $9,200 principal amount of the First Mortgage Bonds of defendant Corporation, to wit, Lillie Mock, Cecelia Alshuler, Crowley Co., Inc., Katherine Gold

and Walter L. Gold, on whose behalf an action was commenced on January 19, 1931 in the Municipal Court in the City, County and State of New York by one Edythe H. Stegman against the defendant Corporation to *to* recover the interest due on said Bonds on December 1, 1930; that on or about December 28, 1931, a motion, by the plaintiff for a summary judgment in said action was granted, but no judgment was then or has since been entered therein; that prior to the commencement of said action a Committee was formed for the protection of the holders of the First Mortgage Bonds of the defendant Corporation with which [fol. 63] Committee there have been deposited approximately 70% of the issued and outstanding First Mortgage Bonds of the defendant Corporation; that it was and is the deliberate judgment of said Committee and of this deponent that it is not in the interest of the First Mortgage Bondholders of the defendant Corporation to take action at the present time to enforce against the defendant Corporation the remedies of the trustee or the bondholders under the mortgage or otherwise; that in the interest of said Committee and of the defendant Corporation, as well as in his own interest, deponent requested the defendant Corporation's attorneys to seek to arrange an interview with said Walter L. Gold in Milwaukee, Wisconsin, for the purpose of acquainting him with facts which deponent believed should and would dissuade him from entering judgment in the said New York action; that the defendant Corporation's attorneys reported to deponent that they had conferred with one Zinman, the New York attorney in charge of said New York action for said Walter L. Gold, who had stated that he would write to said Walter L. Gold requesting such a conference in Milwaukee and that thereafter the defendant Corporation's said attorneys informed deponent that said Zinman had stated to them that he had so written and that he had received a letter in reply from said Walter L. Gold stating, among other things, that he saw no purpose to be gained by having a conference in Milwaukee; that thereafter deponent and the Secretary of the defendant Corporation and one of the defendant Corporation's attorneys called upon the said Zinman on the afternoon of Monday, January 11, 1932, and after stating to said Zinman the serious consequences to the defendant Corporation and to all holders of its First Mortgage Bonds which would result from the entry of judgment in said action and their desire that an oppor-

tunity be afforded to present the situation to said Walter L. [fol. 64] Gold, deponent stated that he would be in Chicago the latter part of that week and requested said Zinman to communicate by telephone with said Walter L. Gold and request that deponent be permitted to call on said Walter L. Gold in Milwaukee for the purpose of advising him of the situation in an endeavor to persuade him not to have judgment entered in said New York action; that said Zinman agreed that he would so telephone and on the following morning deponent was informed by the defendant Corporation's attorney that said Zinman had informed him that he (Zinman) had telephoned to said Walter L. Gold the desire of deponent to confer with the said Walter L. Gold in Milwaukee for the purposes aforesaid, and that said Walter L. Gold had agreed that he would see deponent in his office in Milwaukee and would withhold entry of judgment in said New York action pending such conference; that pursuant to the engagement so arranged and relying upon the representations and invitations of the said Walter L. Gold aforesaid, deponent went to the City of Milwaukee, Wisconsin, from Chicago and on Thursday, January 14, 1932, at about 10:30 A. M. called at the office of said Walter L. Gold solely for the purpose of discussing with him the said New York action and of presenting to him the facts which deponent believed would persuade the said Walter L. Gold to refrain from entering judgment in said action and to deposit his own bonds and recommend to those whom he represented the deposit of their bonds with said Bondholders' Protective Committee; that deponent was in said office from about 10:30 A. M. to about 12 noon or 12:05 P. M. and attempted to state to said Walter L. Gold the facts with respect to the affairs of the defendant Corporation and the reasons why it was not to his interest nor to the interest of the other bondholders whom he represented to enter judgment in such action but that the said Walter L. Gold stated he was not in- [fol. 65] terested in such facts, that he knew the facts to be otherwise, and said Walter L. Gold clearly had no desire nor intention to discuss with deponent the facts and matters which said Walter L. Gold had been informed deponent was to call to discuss and which deponent had been led to believe said Walter L. Gold would in good faith discuss with him; that just prior to the close of their interview, said Walter L. Gold attempted to serve deponent with the summons in this action and summonses and complaints in six other actions

by the following alleged bondholders as plaintiffs respectively against the defendant Corporation, Walter L. Gold, Lillie Mock, Katherine Gold, Blanche Oster, Cecelia Alshuler, Central Holding Company, Gold Realty Company; that the attempted service of said summonses and complaints was made during said interview at the office of said Walter L. Gold as aforesaid and at the time and place designated by said Walter L. Gold for the said conference, in complete disregard of the confidence and trust reposed in said Walter L. Gold by deponent and while deponent was in the State of Wisconsin and in said Walter L. Gold's office upon his invitation and for the purposes aforesaid; that said summonses and complaints in said action were of such length that they could not have been prepared after deponent's arrival at the office of said Walter L. Gold, and deponent verily believes that said summonses and complaints were prepared prior to the arrival of deponent and that said Walter L. Gold invited and enticed and lured deponent into the State of Wisconsin for the purpose of serving him with the summons in this action and the summonses and complaints in the other actions above referred to.

[fol. 66] 7. That deponent is advised and alleges that the service attempted to be made in this action upon the defendant Corporation and upon deponent individually as aforesaid is void; that such attempted service both as to the defendant Corporation and as to deponent individually constitutes an abuse and misuse of the process of this Court and that to give effect to such attempted service would constitute a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Frederick K. Rupprecht.

Sworn to before me this 29th day of January, 1932. Commission expires March 30, 1932. B. A. Gunn, Notary Public, New York County. N. Y. Co. Cl'k's No. 368, Reg. No. 20378. (Notarial Seal.)

[fol. 67] EXHIBIT "D" TO PETITION

STATE OF WISCONSIN,
Milwaukee County:

CIRCUIT COURT

KATHERINE GOLD, Plaintiff,

vs.

CONSOLIDATED TEXTILE CORPORATION, Defendant

STATE OF WISCONSIN,
Milwaukee County, ss:

Walter L. Gold, being first duly sworn on oath, deposes and says that he is one of the attorneys for the plaintiff in the above entitled action. That on January 8, 1932, he received a letter from Mr. Samuel Zinman, an attorney at law of the firm of Bernstein & Zinman, 258 Broadway, New York, with whom he was in correspondence about the action of Edythe H. Stegman vs. Consolidated Textile Corporation, which was a suit brought in the municipal court of the city of New York, Borough of Manhattan, Ninth District, for the collection of the sum of $368 interest on bonds issued by Consolidated Textile Corporation, which became due on December 1, 1930, and he was advised in such letter that in that action the plaintiff's motion for summary judgment was granted by the New York court. On the subject of the desire of Consolidated Textile Corporation to send a representative to Milwaukee to see affiant, Mr. Zinman stated in his letter as follows:

"Defendant's attorneys have apparently made some investigation in this matter for they are aware of the fact that you are an attorney and they assume that you have control over the other parties. They are desirous of having one of the Company's representatives go out to Milwaukee for the purpose of conferring with you and possibly persuading you that it is to the best interests of all bondholders that no judgment be entered in this action and that no further proceedings be taken.

"Our consent was requested to having the company's representative see you directly. Naturally, our position was

[fol. 68] that we represent the plaintiff in this action and that even if the matter is to be discussed with the owners of the bonds, you were the owner of but $2,000 of the $10,200 of bonds here involved. Mr. Bisbee was, however persistent in the matter and we finally stated that we would place the matter before you; that we had been retained to go into this matter and that we could see no reason why we should consent to having the defendant discuss the situation with the owners of the bonds.

"Of course, there is nothing to prevent the defendant from sending a representative to see you without our consent and Mr. Bisbee pointed this out to us but we stated that our objection was to having anyone interview you and saying that he is doing so with our consent. We finally arranged that we would write to you giving you the substance of the conversation. Mr. Bisbee requested that we advise you that we have no objection to your interviewing the Company's representative. Needless to say, that is so."

Affiant answered said letter on January 9, 1932, and on that subject wrote as follows:

"I can see nothing gained by having a conference in Milwaukee with the representative of the Consolidated Textile Corporation.

"I am in favor, if you agree, of having you insist upon the entry of judgment for the coupons presently due and for those which have matured since the commencement of suit, and on which suit has not yet been brought."

On January 11, 1932 affiant received a telephone call from Mr. Zinman from New York stating that a representative or officer of the Consolidated Textile Corporation, who claimed to know some friends or relatives of affiant's, was going to call upon affiant in Milwaukee. Deponent then and there stated to Mr. Zinman that he did not believe that anything could be accomplished in such an interview, but that if they (meaning the Consolidated Textile Corporation people) insisted, affiant would have such interview. No appointment was made for any interview, and affiant was not informed as to when any representative of Consolidated Textile Corporation would call upon him in Milwaukee.

On the morning of January 14, 1932, there appeared at affiant's office a gentleman whom deponent had never seen before, and who presented a card reading as follows:

[fol. 69] "Frederick K. Rupprecht

President Consolidated Textile Corporation, 88 North Street, New York."

Mr. Rupprecht introduced himself, and stayed in affiant's office for about two hours. Mr. Rupprecht stated to affiant that he was in Milwaukee to see Mr. Loeffler of Goll and Frank, and Gimbel Bros., who were customers of Consolidated Textile Corporation.

After some discussion of mutual acquaintances in New York, Mr. Rupprecht tried to interest affiant in the sale of Consolidated Textile Corporation's mills at Henderson, Kentucky. A large part of the conversation was devoted by Mr. Rupprecht in discussing the properties of the company at Henderson, the number of spindles at the Henderson plant, that there were people in Kentucky interested in investing some $125,000 in the acquisition of such properties from the Consolidated Textile Corporation, and many other details concerning the company's properties in Henderson, and the reason for the desire of the company to sell this property. Mr. Rupprecht said that his company would be glad to pay affiant well for his services in trying to effect such sale and would pay him a commission if a sale were made.

After such discussion, Mr. Rupprecht asked affiant not to have judgment entered by Mr. Zinman in the New York action of Stegman vs. Consolidated Textile Corporation. Mr. Rupprecht stated that he thought it would be to the interest of Edythe H. Stegman and the bondholders represented by affiant, to have the entry of such judgment postponed. Mr. Rupprecht asked affiant to telephone to Mr. Zinman at New York to delay the entry of judgment and affiant finally consented to do so and did telephone to Mr. Zinman and stated to Mr. Zinman that Mr. Rupprecht was in affiant's office and had asked to have entry of judgment delayed for a little while, and affiant stated to Mr. Zinman that he thought it would be advisable for all concerned to delay the entry of judgment in New York.

[fol. 70] After Mr. Rupprecht had been in affiant's office for about an hour, the summons and complaint in the above entitled action was served upon Mr. Rupprecht and in six other cases of a similar nature, which were actions on bonds

by Walter L. Gold, Katherine Gold, Cecilia Alshuler, Gold Realty Company, Central Holding Company and Lillie Mock vs. Consolidated Textile Corporation, and the summons in an action of Walter L. Gold v. Consolidated Textile Corporation and Frederick K. Rupprecht. Mr. Rupprecht remained in affiant's office for about an hour after such service, and attempted to persuade deponent to withdraw the service made upon him, stating that he would cause to be paid all the unpaid interest due on the bonds involved in such actions, including the interest coupons involved in the Stegman action in New York and asked that affiant agree to do nothing with reference to further prosecution of the actions for three or four months with a view of their possible adjustment. Mr. Rupprecht requested deponent to writ him a letter or make some definite offer covering all the actions, which he stated he would submit to the parties interested in New York.

Affiant has read the affidavit of Mr. Rupprecht attached to the special appearance motion in the above entitled action. Affiant told Mr. Rupprecht that none of the holders of the bonds involved in the aforementioned actions commenced in the circuit court of Milwaukee County deposited his, her or its bonds with any bondholders' committee of Consolidated Textile Corporation and gave him the reasons therefor. Affiant stated to Mr. Rupprecht that he made some investigation of the affairs of the Consolidated Textile corporation and obtained financial reports upon the company and its subsidiary, Consolidated Selling Company, Inc., and that he became convinced that the purpose of organizing the bondholders' committee was to execute a plan whereby the Chase National Bank and other banks, who affiant was informed held about $6,500,000 worth of notes of Consolidated Textile Corporation which are subse-
[fol. 71] quent to the first mortgage bonds, might share in the distribution of the proceeds of the property mortgaged to secure the first mortgage bonds; that the attorneys representing the bondholders' committee (Messrs. Rushmore, Bisbee & Stern) are the attorneys for said Chase National Bank; that affiant believes that the property securing the first mortgage bonds is worth more than the amount of bonds outstanding in the sum of $2,750,000 which was reduced from a bond issue of $5,000,000. Affiant further stated to Mr. Rupprecht that he discovered that Consoli-

dated Textile Corporation had organized Consolidated Selling Company, Inc. as the selling agent for Consolidated Textile Corporation and that in a report, by R. G. Dun & Company, a mercantile agency, under date of August 13, 1931, on Consolidated Textile Corporation, which report affiant believed to be correct, it was reported as follows:

"Consolidated Selling Co. Inc. was organized under Delaware laws August 28, 1924, with an authorized capital consisting of $2,000,000. First Preferred stock, par value $100 and bearing 8% interest, $1,000,000 7% Second Preferred, par value $100 and 5,000 shares of no par Common Stock. The outstanding First Preferred of $800,000 was reduced during 1931 to $250,000 by August and will probably be further retired. This class of Preferred has been owned not by the subject company but by outsiders and dividends have been paid to date. The remaining authorized stock of Consolidated Selling Co. Inc., fully issued, is owned by Consolidated Textile Corporation and has been pledged under the stock indenture executed in connection with the five year Secured Gold Notes."

Affiant stated to Mr. Rupprecht that the said payment of $550,000 in retirement of the preferred stock of Consolidated Selling Company, Inc. was made in 1931, which was after Consolidated Textile Corporation had defaulted in the payment of interest upon its first mortgage bonds on December 1, 1931, and that affiant believed that such expenditure of the sum of $550,000 was in violation of the rights of the bondholders inasmuch as Consolidated Selling Company, Inc. is wholly owned by Consolidated Textile Corporation and is merely an agent of Consolidated Textile Corporation. Affiant stated to Mr. Rupprecht that he was convinced that the bondholders' committee was merely [fol. 72] working for the interests of certain insiders of Consolidated Textile Corporation and the banks who hold junior obligations of Consolidated Textile Corporation, not for the benefit of the bondholders.

Affiant did not invite Mr. Rupprecht or any other representative of Consolidated Textile Corporation to come to Milwaukee, but on the contrary attempted to dissuade them from doing so because affiant had no desire to be interviewed on the subject. Affiant did not talk with any repre-

sentative of Consolidated Textile Corporation at any time before Mr. Rupprecht came to affiant's office, and did not lead any one to believe that he desired to discuss anything with any representative of Consolidated Textile Corporation. Affiant did not in any way or manner invite, entice or lure said Mr. Rupprecht into the state of Wisconsin, but on the contrary the Consolidated Textile Corporation people insisted upon sending some one to see affiant after he had discouraged the idea and distinctly stated that he saw nothing to be gained by any interview upon the subject of the bonds.

When Mr. Zinman telephoned to affiant on January 11, 1932 as aforesaid, and affiant gave him his reply as aforesaid, affiant did not have in mind the commencement of any actions against Consolidated Textile Corporation. It was not until the following day, to-wit: on January 12, 1932, that it occurred to affiant that if Consolidated Textile Corporation did send such officer or agent to Wisconsin as would subject it to service of process in Wisconsin, that he would have him served with process.

Thereupon, on January 12, 1932 he directed Mr. Morris Karon, an attorney at law associated with affiant's firm, to commence the preparation of the summons and complaint in the above entitled action and the other actions aforementioned.

[fol. 73] Affiant has been informed that through Consolidated Selling Co., Inc., which is the selling agency for Consolidated Textile Corporation and is a subsidiary wholly controlled by Consolidated Textile Corporation and is an agent of Consolidated Textile Corporation, the Consolidated Textile Corporation sells goods in Wisconsin, to-wit: to Gimbel Bros. in Milwaukee and Sears, Roebuck & Co., in Milwaukee.

Walter L. Gold.

Subscribed and sworn to before me this 19th day of February, 1932. Edna Crowley, Notary Public, Milwaukee County, Wisconsin.

[fol. 74] EXHIBIT "D-1" TO PETITION

STATE OF WISCONSIN,
Milwaukee County:

CIRCUIT COURT

KATHERINE GOLD, Plaintiff,

vs.

CONSOLIDATED TEXTILE CORPORATION, Defendant

STATE OF WISCONSIN,
Milwaukee County, ss:

Morris Karon, being first duly sworn on oath, deposes and says that he is an attorney at law associated with the firm of Gold and McCann, attorneys for the plaintiffs in the above entitled action; that on January 12, 1932, Mr. Walter L. Gold asked affiant to prepare summons and complaint in the above entitled action and in the actions of Walter L. Gold, Katherine Gold, Cecilia Alshuler, Gold Realty Company, Central Holding Company and Lillie Mock vs. Consolidated Textile Corporation, and to prepare a summons in an action of Walter L. Gold vs. Consolidated Textile Corporation and Frederick K. Rupprecht. That affiant commenced the preparation of said summonses and complaints in the said actions on January 12, 1932.

Morris Karon.

Subscribed and sworn to before me this 19th day of February, 1932. Edna Crowley, Notary Public, Milwaukee County, Wisconsin.

[fol. 75] EXHIBIT "E" TO PETITION

STATE OF WISCONSIN,
Milwaukee County:

CIRCUIT COURT

No. 117,880

KATHERINE GOLD, Plaintiff,

vs.

CONSOLIDATED TEXTILE CORPORATION, Defendant

Order

The motion of the defendant, upon special appearance in the above entitled action, to set aside the service of the summons and for dismissal of the action having come on for hearing before the court above named in that branch thereof presided over by the Honorable John J. Gregory, Circuit Judge presiding, in the court room of the said court in the Court House, in the city and county of Milwaukee, state of Wisconsin, on the 9th day of April, 1932, plaintiff appearing by Gold and McCann represented by Morris Karon, her attorneys, and the defendant appearing by Bottum, Hudnall, Lecher, McNamara & Michael by Suel O. Arnold, its attorneys, and the court having considered the affidavits filed and the arguments of counsel and the briefs submitted, and being duly advised in the premises, and defendant having in open court abandoned the claim that Frederick K. Rupprecht was enticed into the state of Wisconsin,

Now, therefore, the court finds that the summons and complaint herein were properly served upon the defendant and the court thereby obtained jurisdiction over the person of the defendant in this action;

It is therefore ordered that the said motion of the defendant to set aside and vacate the service of the summons and for the dismissal of the action herein be and the same hereby is denied with ten dollars ($10) motion costs in favor of the plaintiff.

By the Court:

John J. Gregory, Circuit Judge.

Dated June 30, 1932.

[fol. 76] EXHIBIT "F" TO PETITION

STATE OF WISCONSIN,
Milwaukee County:

CIRCUIT COURT

KATHERINE GOLD, Plaintiff,

vs.

CONSOLIDATED TEXTILE CORPORATION, Defendant

At a regular term of the Circuit Court for Milwaukee County, begun and held at the Court House, in the City of Milwaukee, Milwaukee County, Wisconsin, on the first Monday in July, 1932, and on a subsequent day in said term, towit, the 29th day of August, 1932, in that branch of said court presided over by the Hon. John J. Gregory, Circuit Judge.

The order to show cause of the defendant why the defendant should not be granted a re-hearing and review of the order hereinbefore entered on the 30th day of June, 1932, having come on to be heard before the court, in that branch thereof presided over by the Hon. John J. Gregory, Circuit Judge, the plaintiff appearing by Gold and McCann, her attorneys, and the defendant appearing specially for the sole purpose of moving for a rehearing and review of said order by Bottum, Hudnall, Lecher, McNamara & Michael, its attorneys, and it appearing to the court that the defendant did not have notice or knowledge of said order of June 30, 1932 until the 12th day of July, 1932, and that on the 1st day of July, 1932 judgment for default of answer was entered as prayed for in said complaint, and it further appearing that justice requires that the defendant should be granted a period of five (5) days within which to enter a general appearance, demur, answer or otherwise plead to the plaintiff's complaint,

[fol. 77] Now, therefore, on the court's own motion,

It is ordered that the said judgment, dated July 1, 1932, be and the same is hereby vacated and set aside.

It is further ordered that the defendant be given a period of five (5) days from the date of this order within which to

enter a general appearance, demur, answer or otherwise plead to the plaintiff's complaint or to take further proceedings in said action, and that no judgment shall be taken by the plaintiff until the expiration of said five (5) day period.

It is further ordered that in case the defendant shall not enter a general appearance, demur, answer or otherwise plead to the said complaint within a period of five (5) days from the date of this order, judgment may be entered by the plaintiff for default in answer at any time after the expiration of said five (5) day period.

Dated Milwaukee, Wisconsin, August 30, 1932.

By the Court:

John J. Gregory, Judge.

[fol. 78] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN, AUGUST TERM, 1932

State No. 22

STATE EX REL. CONSOLIDATED TEXTILE CORPORATION, a Corporation, Petitioner,

vs.

JOHN J. GREGORY, Judge of the Circuit Court of Milwaukee County, Respondent

ALTERNATIVE WRIT OF PROHIBITION—Filed Sept. 27, 1932

The State of Wisconsin to Honorable John J. Gregory, Judge of the Circuit Court of Milwaukee County, Wisconsin, and Katherine Gold, Greeting:

Whereas it has been made to appear to our Court, upon the verified petition of Consolidated Textile Corporation, as follows:

(1) That your petitioner is a corporation organized under the laws of the State of Delaware with its office and principal place of business in the city, county and state of New York.

(2) That Frederick K. Rupprecht is the President of your petitioner, and is a resident of the city, county and state of New York.

(3) That on the 14th day of January, 1932, a summons, a copy of which, marked exhibit "A", is hereto annexed and forms a part hereof as if fully set forth herein, was served on Frederick K. Rupprecht, whereby your petitioner was summoned to appear in the Circuit Court for Milwaukee County to answer the plaintiff's complaint, copy of which, marked exhibit "B", is hereto annexed and forms a part hereof as if fully set forth herein.

[fol. 79] (4) That in pursuance to said summons, your petitioner, by Bottum, Hudnall, Lecher, McNamara & Michael, its attorneys, appearing specially for the sole purpose of moving to vacate and set aside the service of the summons and to dismiss said action on the ground that the Court did not have jurisdiction over said action and on the 13th day of February, 1932, attended before the Court and moved to vacate and set aside the service of the summons and to dismiss said action on the ground that the Court had no jurisdiction over said action for the following reasons: That your petitioner was a corporation organized and existing under and by virtue of the laws of the State of Delaware; that it was not licensed to do business in the State of Wisconsin; that it had not in fact done business in the State of Wisconsin, and that it had no property or place of business or office or agent in the State of Wisconsin; that Frederick K. Rupprecht, president of your petitioner, was a resident of the city, county and state of New York; that service of said summons on the said Frederick K. Rupprecht was made while he was temporarily within the city and county of Milwaukee and State of Wisconsin; all of which said facts and circumstances were more particularly set forth in the affidavit of the said Frederick K. Rupprecht which is now on file in the Circuit Court for Milwaukee County, and constituted a part of the motion of your petitioner to vacate and set aside the service of the summons and to dismiss said action, copy of which affidavit, marked Exhibit "C", is attached hereto and forms a part hereof as if fully set forth herein; that the service of summons on a foreign corporation was controlled by the Statutes of the State of Wisconsin; that the only Statute in

Wisconsin which in any manner might authorize service of [fol. 80] said summons was Subsection (13) of Section 262.09 of the Wisconsin Statutes; that the service of said summons was not authorized under Subsection (13) of Section 262.09 of the Wisconsin Statutes; that if the service of said summons was authorized under Subsection (13) of Section 262.09 of the Wisconsin Statutes, said Subsection (13) of Section 262.09 of the Wisconsin Statutes was unconstitutional in that it deprived your petitioner of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States; that the service of said summons under the said circumstances, as hereinbefore related, deprived your petitioner of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

(5) That the plaintiff in said action in opposition to said motion to vacate and set aside the service of summons and to dismiss said action, filed affidavits of Walter L. Gold and Morris Karon, which said affidavits are now on file in the Circuit Court for Milwaukee County, as a part of the file in said action, copies of which affidavits, marked respectively Exhibits "D" and "D-1", are attached hereto and form a part hereof as if fully set forth herein; that said affidavits are made a part of this petition at the request of the attorney representing the plaintiff in said action to obviate the necessity of filing a return to the alternative writ of prohibition to be issued hereunder by the Supreme Court.

(6) That the sole purpose of the said Frederick K. Rupprecht in coming to Milwaukee on the said 14th day of January, 1932, was to confer with the said Walter L. Gold [fol. 81] and was not for the purpose of transacting business for your petitioner; that the said Frederick K. Rupprecht did not on the 14th day of January, 1932, or at any other time, confer with Gimbel Brothers in the City of Milwaukee or State of Wisconsin or with any other mercantile establishment in the City of Milwaukee.

(7) That your petitioner has not at any time transacted any business in Wisconsin in any manner whatsoever; that the Consolidated Selling Company is a corporation organ-

ized under the laws of the State of Delaware with its office and principal place of business in the City, County and State of New York; that your petitioner owns all of the stock of the said Consolidated Selling Company; that said Consolidated Selling Company is not licensed to do business in the State of Wisconsin and that the only business conducted by the Consolidated Selling Company in Wisconsin is interstate in character and is conducted by means of nonresident agents who solicit orders in Wisconsin which are accepted in New York City.

(8) That the cause of action set forth in the plaintiff's complaint a copy of which marked Exhibit "B" is attached hereto and forms a part hereof shows upon its face that the cause of action therein alleged arose out of a transaction outside the State of Wisconsin; that the said bonds referred to in said complaint were a portion of an issue of twenty year eight per cent sinking fund convertible gold bonds which were issued by your petitioner; that the principal and interest on the said bonds are payable at the principal [illegible]ce of the Chase National Bank in the City, County and State of New York; that no part of the transaction in which said bonds were issued by your petitioner took place in the State of Wisconsin; that if Subsection (13) of Sec-
[fol. 82] tion 262.09 of the Statutes authorized service on your petitioner, Subsection (13) of Section 262.09 violates the Fourteenth Amendment to the Federal Constitution by depriving your petitioner of its property without due process of law.

(9) That the said action in which the said Katherine Gold is plaintiff and Consolidated Textile Corporation is defendant, is one of seven actions now pending in the Circuit Court for Milwaukee County for the recovery of principal and interest on bonds issued by your petitioner, and in which your petitioner is defendant; that the names of the plaintiffs in said actions are as follows: Cecilia Alshuler, Blanche Oster, Lillie Mock, Walter L. Gold, Gold Realty Company, a corporation, and Central Holding Company, a corporation; that pursuant to agreement with counsel representing said plaintiffs, the decision of this Court in this proceeding shall be controlling in all of said actions.

(10) That the hearing on said motion to vacate and set aside the service of said summons and to dismiss said action

was postponed from time to time until the 9th day of April, 1932, at which time said motion was argued before the said Circuit Court for Milwaukee County in that branch presided over by the Honorable John J. Gregory, Circuit Judge presiding.

(11) That the said the Honorable John J. Gregory, notwithstanding said motion and objection, did proceed to hear said cause and refuse to dismiss the same, and on or about the 30th day of June, 1932, decided that he had jurisdiction over said action, and on said day entered an order, a copy of which, marked Exhibit "E," is attached hereto and forms a part hereof as if fully set forth herein, dismissing the said motion of your petitioner to vacate and set aside the service of said summons and to dismiss said action; that thereafter and on the 1st day of July, 1932, judgment was entered [fol. 83] in favor of the plaintiff and against the defendant, your petitioner, as prayed for in said complaint; that neither your petitioner nor its attorneys, Bottum, Hudnall, Lecher, McNamara & Michael, had knowledge or notice of said order dated June 30, 1932, or of said judgment dated July 1, 1932, until the 12th day of July, 1932, at which time the attorneys for the plaintiff served notice of entry of order and notice of entry of judgment on the attorneys for your petitioner; that immediately thereafter said attorneys for the Consolidated Textile Corporation communicated with the Honorable John J. Gregory, Circuit Judge, who was on his vacation at Sayner, Wisconsin, requesting said Judge to sign an order to show cause why a rehearing and review of said order of June 30, 1932, should not be granted; that on the 28th day of July, 1932, an order to show cause signed by the said the Honorable John J. Gregory, returnable on the 29th day of August, 1932, the date on which said Judge would return from his said vacation, was served on the attorneys for the plaintiff; that on the 29th day of August, 1932, said order to show cause came on to be heard before the Circuit Court for Milwaukee County, the said Honorable John J. Gregory, Circuit Judge, presiding, who thereupon announced in open Court his decision that by reason of the fact that neither your petitioner nor its said attorneys had knowledge or notice of said order of June 30, 1932, prior to the entry of the judgment on July 1, 1932, the Court on its own motion would set aside said judgment of July 1, 1932, and would stay

entry of judgment for a period of five (5) days thereafter to permit your petitioner to enter a general appearance, to demur, to answer or otherwise plead to the plaintiff's complaint; that on the 30th day of August, 1932, an order was entered in accordance with the said oral decision of the said court, a copy of which, marked Exhibit "F," is [fol. 84] hereto annexed and forms a part hereof as if fully set forth herein; that pursuant to said order your petitioner was required to make a general appearance, to demur, to answer or otherwise plead to the plaintiff's complaint on or before September 6, 1932, or in the alternative to permit judgment to go against your petitioner by default.

(12) That your petitioner has no speedy or adequate remedy by appeal or otherwise.

Nevertheless you, the said John J. Gregory, Judge of the Circuit Court of Milwaukee County, and Katherine Gold, contriving unjustly to oppress the said Consolidated Textile Corporation, as it is alleged, by proceeding in said action and are about to enter judgment for default in answer against the said Consolidated Textile Corporation notwithstanding the fact that the Circuit Court for Milwaukee County has no jurisdiction, against the laws and customs of our State and to the manifest injury and damage of the said Consolidated Textile Corporation.

We therefore, being willing that the laws and customs of our state should be observed and that all good and faithful citizens should in no wise be oppressed, do command you the said John J. Gregory, Judge of the Circuit Court of Milwaukee County, and Katherine Gold, to desist and refrain from any further action in said proceedings specified in said relation and herein, until the further order of this Court thereon; and that on the 14th day of October, 1932, at nine o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, in the court room of the Supreme Court of the State of Wisconsin in the Capitol at Madison, Wisconsin, you show cause before our said court why you should not be absolutely restrained from any further proceedings in the said action.

[fol. 85] And have you then and there this Writ.

Witness the Honorable Marvin B. Rosenberry, Chief Justice of our said Court, this 27th day of September, 1932.

Arthur A. McLeod, Clerk. (Seal Supreme Court of Wisconsin.)

The within Writ allowed to issue this 27th day of September, 1932.

Marvin B. Rosenberry, Chief Justice.

Exhibit "A".—Summons (same as exhibit "A" attached to petition).

Exhibit "B".—Complaint (same as exhibit "B" attached to petition).

Exhibit "C".—Affidavit of Frederick K. Rupprecht (same as exhibit "C" attached to petition).

Exhibit "D".—Affidavit of Walter L. Gold (same as exhibit "D" attached to petition).

Exhibit "D-1".—Affidavit of Morris Karon (same as exhibit "D-1" attached to petition).

Exhibit "E".—Order overruling motion to quash (same as exhibit "E" attached to petition).

Exhibit "F".—Order vacating and setting aside judgments (same as exhibit "F" attached to petition).

[fol. 86] Here appears motion to quash alternative writ of prohibition.

[fols. 87 & 88] Here appears admission of service of petition for writ of prohibition, alternative writ of prohibition, and motion to quash.

[fol. 89] [File endorsement omitted]

In Supreme Court of Wisconsin

[Title omitted]

Return to Alternative Writ of Prohibition—Filed Oct. 12, 1932

I, John J. Gregory, Judge of the Circuit Court of Milwaukee county, Wisconsin, the respondent above named, do hereby respectfully make this answer to the petition of

Consolidated Textile Corporation praying for writ of prohibition to issue out of this court in the above entitled cause, and do hereby respectfully make return to the alternative writ of prohibition issued out of the above named court in the above entitled cause, as follows:

1. That exhibits "A" and "B" attached to the aforesaid petition and alternative writ of prohibition appear to be true and correct copies of the summons and complaint in said action.

2. That exhibit "C" attached to said petition and alternative writ appears to be a true and correct copy of the affidavit of Frederick K. Rupprecht filed by the defendant upon defendant's motion for vacation of the service of process in said action.

[fol. 90] 3. That Exhibit "D" attached to said petition and alternative writ appears to be a true and correct copy of the affidavit of Walter L. Gold filed by the plaintiff upon the defendant's motion for vacation of the service of process in said action.

4. That exhibit "D-1" attached to the petition for writ of prohibition appears to be a true and correct copy of the affidavit of Morris Karon filed by the plaintiff upon the defendant's motion for vacation of the service of process in said action.

5. That exhibit "E" attached to said petition and alternative writ appears to be a true and correct copy of the order made by the respondent in the said action denying the said defendant's motion to set aside and vacate the service of the summons in said action.

6. That exhibit "F" attached to said petition and alternative writ appears to be a true and correct copy of the order made by the respondent vacating the default judgment rendered in said action after the entry of the said order denying the vacation of the service of process, and granting the defendant a period of five (5) days within which to plead to the complaint in said action.

7. Respondent further respectfully shows to the court that the said defendant Consolidated Textile Corporation,

by its attorneys, in open court withdrew its alleged claim that Frederick K. Rupprecht, president of said defendant corporation, was enticed into the state of Wisconsin for the purpose of serving process upon the defendant corporation within this state.

8. Respondent further respectfully shows to the court that from the affidavit of said Frederick K. Rupprecht, president of said defendant Consolidated Textile Corpora- [fol. 91] tion, it clearly appeared to the respondent that said Rupprecht as president of the said corporation insisted, against the objection of plaintiff's attorney, Walter L. Gold, upon coming to Wisconsin for the purpose of attempting to settle a controversy between said Katherine Gold, a holder of bonds of Consolidated Textile Corporation, and Consolidated Textile Corporation, and controversies between said Consolidated Textile Corporation and six other bondholders, who likewise held said corporation's bonds, to-wit, Central Holding Company, Gold Realty Company, Walter L. Gold, Lillie Mock, Cecelia Alshuler and Blanche Oster, who are all residents of Wisconsin. That the claims of said seven bondholders against Consolidated Textile Corporation were based on bonds issued by said Consolidated Textile Corporation and sold to said bondholders for value, and said Consolidated Textile Corporation had defaulted in the payment of interest and principal of said bonds and the total claims of the said seven bondholders exceeded the sum of $15,000.

9. Respondent further respectfully shows to the court that upon the argument of said defendant's motion to set aside the service of process in said cases, said defendant, by its attorneys, assumed that the statements contained in the affidavit of Walter L. Gold were true. I found that all the statements contained in the affidavits of Walter L. Gold and Morris Karon were true.

10. Respondent further respectfully shows to the court that I found that the action of Edythe H. Stegman vs. Consolidated Textile Corporation, commenced in the Municipal Court of the City of New York, was not brought on behalf of Katherine Gold, plaintiff in this action, or the other bondholders aforementioned, but was solely in the name of said Edythe H. Stegman to recover $368 on bearer interest

coupons for interest due on bonds issued by Consolidated Textile Corporation, and a motion for summary judgment [fol. 92] had been granted in favor of said Edythe H. Stegman in that action, and that said action of Edythe H. Stegman had nothing to do with this action, or the actions of the other six bondholders aforementioned. Said Stegman action involved different interest coupons from those involved in the Wisconsin actions.

11. Respondent further shows to the court that upon full and fair consideration of the affidavits of both the plaintiff and the defendant upon the said motion, I found that said Frederick K. Rupprecht, president of said defendant corporation, was sent by said defendant corporation to Wisconsin to attempt to settle the seven individual claims of Wisconsin bondholders against said defendant corporation and at the time of the service of process in the above case upon him, he was in Wisconsin on the business of said defendant corporation, and that he was then engaged in conducting business of said corporation in Wisconsin; that he was then also in Wisconsin on the business of said corporation with several of its customers in Wisconsin; and that in addition said defendant corporation had been doing business in Wisconsin through a wholly owned and controlled subsidiary, Consolidated Selling Company, Inc. Upon those facts, I found that the summons and complaint in said cause were properly served upon the defendant corporation. I could not lawfully or conscientiously have decided the said motion to vacate the service of the summons and complaint in favor of the defendant. The determination of said motion involved the determination of questions of fact and law and I concluded that my determination was within my power and jurisdiction as a judge of the said circuit court, and in conscience and in law I concluded that it was my duty to decide that the service of process upon the defendant was valid and that the court obtained jurisdiction over the person of the defendant in said action.

All of which is respectfully submitted.

(Signed) John J. Gregory.

[fol. 93] *Duly sworn to by John J. Gregory. Jurat omitted in printing.*

[fol. 94] The foregoing return is hereby adopted by the undersigned, Katherine Gold, named in the alternative writ of prohibition aforementioned and will be relied upon as a sufficient cause why said alternative writ of prohibition should not be made absolute herein.

(Signed) Gold & McCann, Attorneys for Katherine Gold.

[fols. 95-98] Here appears motion to withdraw motion to quash alternative writ of prohibition and supporting affidavit.

[fol. 99] IN SUPREME COURT OF WISCONSIN

[Title omitted]

STIPULATION AS TO WITHDRAWAL OF MOTION TO QUASH, ETC.—Filed Oct. 14, 1932

It is hereby stipulated between counsel representing the respective parties, Bottum, Hudnall, Lecher, McNamara & Michael appearing for the said Petitioner, and Gold & McCann appearing for the said Respondents, that the Motion to Quash the Alternative Writ herein filed on behalf of Catherine Gold is hereby withdrawn, and that the return of the respondent, Hon. John J. Gregory, which has been adopted by the respondent, Katherine Gold, shall be substituted in lieu of said Motion to Quash; that there shall be added the following words after the word "that" on the last page of said return of the Hon. John J. Gregory:—"Mr. Rupprecht told Mr. Gold that" he was then also in Wisconsin on the business of said corporation with several of its customers in Wisconsin; that the Petitioner hereby demurs to said return.

Dated October 14th, 1932.

Bottum, Hudnall, Lecher, McNamara & Michael, Attorney- for Petitioner. Gold & McCann, Attorney- for Respondents.

[File endorsement omitted.]

[fol. 100] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ARGUMENT AND SUBMISSION—Oct. 14, 1932

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Suel O. Arnold, Esq., for the said plaintiff, and by Morris Karon, Esq., for the said defendant, and submitted, and the Court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

Stipulated in open court that the motion to quash the alternative writ be withdrawn and that the return of Hon. John J. Gregory, which has been adopted by the respondent Gold, shall be substituted in lieu of said motion to quash.

[fols. 101 & 102] IN SUPREME COURT OF WISCONSIN

STATE ex Rel. CONSOLIDATED TEXTILE CORPORATION, Plaintiff,

vs.

HON. JOHN J. GREGORY, Judge of the Circuit Court of Milwaukee County, Respondent

Original Action

Opinion by Justice Fairchild

JUDGMENT—Nov. 9, 1932

This cause came on to be heard on the demurrer to the return to the alternative writ of prohibition and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the demurrer to the return, be, and the same is hereby, overruled, and that the writ be, and the same is hereby, denied.

And it is further ordered that the temporary restraining order be, and the same is hereby, dissolved.

[fol. 103] IN SUPREME COURT OF WISCONSIN

State No. 22, August Calendar, 1932

STATE ex Rel. CONSOLIDATED TEXTILE CORPORATION, Petitioner,

v.

JOHN J. GREGORY, Judge of the Circuit Court for Milwaukee County, Respondent

Prohibition to the Circuit Court for Milwaukee County, John J. Gregory, Judge. Writ Denied

OPINION—Filed Nov. 9, 1932

Petition for a writ of prohibition filed August 31, 1932, pursuant to leave to prevent further proceedings in an action pending in the circuit court for Milwaukee County, wherein Katherine Gold is plaintiff and Consolidated Textile Corporation, defendant.

The Consolidated Textile Corporation is a corporation organized under the laws of the state of Delaware with its office and principal place of business in New York City. Service of the summons was made upon Frederick Rupprecht, the president thereof, while he was in the city of Milwaukee for purpose of a conference with the attorneys of Mrs. Gold and of six other bondholders, to attempt to settle the controversy between such bondholders and the Consolidated Textile Corporation. That the claims of such seven bondholders were based on bonds issued by the said petitioner and sold to such persons for value. The petitioner had defaulted in the payment of interest and principal on said bonds. There was a special appearance in the circuit court action and motion to set aside the service of the process. The trial court determined upon the affidavits [fol. 104] submitted that the said Rupprecht president of the petitioner, was sent by it to Wisconsin to settle the seven individual claims of the Wisconsin bondholders against said corporation, one of which is the basis of the suit; that at the time of the service of the summons the said Rupprecht was in Wisconsin on business of said petitioner and was engaged in conducting such business, and

"in addition said defendant corporation had been doing business in Wisconsin through a wholly owned and controlled subsidiary, Consolidated Selling Company, Inc." It appears that the Consolidated Textile corporation owned all of the stock of the Consolidated Selling Company, which is a corporation organized under the laws of the state of Delaware with its office and principal place of business in the city, county and state of New York. The Consolidated Selling Company is not licensed to do business in the state of Wisconsin so that the business conducted by it in the state is interstate in character and is carried on by means of nonresident agents soliciting orders in Wisconsin accepted in New York City.

Upon the facts the trial court held that the summons and complaint were properly served and denied the motion to dismiss. The matter was brought here by petition and further proceedings in the circuit court stayed.

[fol. 105] FAIRCHILD, J.:

Our law treats as present within our boundaries a foreign corporation when it is doing business here; and provision is made for service of process upon such a corporation, as the circumstances may warrant, either by service upon the secretary of state in the manner provided by sec. 226.02, when the cause of action arises out of the business transacted within the state or when the defendant has property here, or upon an agent having charge of or conducting any business for such corporation within the state, or, as material in this case, by service upon an officer who is within the state for the purpose of transacting business for the corporation, and who is vested with authority to transact such business within the state; but the service provided for can be made only when such corporation has property within the state or the cause of action arose within the state, or the cause of action exists in favor of a resident of the state. The validity of the service on a foreign corporation by serving process on an agent or secretary of state may depend on a showing of a continuous course of business, while service upon its president or other officer designated by statute through and by whom the corporation has entered the state for a special and for its own peculiar purpose, even though it amounts to a single transaction, may

be perfectly good. It is perceived that the statute does not constitute a single transaction of an isolated nature a sufficient disclosure of the corporate presence to support a service on an agent or secretary of state, Penn Collieries v. McKeever, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. n. s. 127, while it does provide for such service on the president or other proper officer if in the state for the purposes of a corporation, when the cause of action exists in favor of a resident of the state and arises out of the matter, to control [fol. 106] which the corporation has come within the state. Under one mode of service, for the purpose of discovering the presence of the corporation, the inquiry involves the extent of business done, under the other we are concerned only with the question as to whether the corporation has so acted as to manifest its presence in the person of its officers to the extent that we may say, it was here at the time and subject to service of process. As was said, although with relation to a different state of facts, in opinion by Mr. Justice Cordoza in Tauza v. Susquehanna Coal Co., 220 N. Y. 259, 267: "Activities insufficient to make out the transaction of business, with the meaning of those statutes, may yet be sufficient to bring the corporation within the state so as to render it amenable to process."

The plaintiff whose attempt to secure service is challenged in this proceeding is a resident of the state of Wisconsin. It is conceded that the president of the defendant corporation came into this state in an attempt to accomplish a result in connection with the matter sued on which would be beneficial to the defendant in that action because of the emergency in which it found itself after its default on its bonds. A foreign corporation is present in this state when an officer thereof, vested with authority, is here transacting business for it. The corporation under such circumstance is not merely represented for its own purpose, but it is actually here, and it must accept the plain and unavoidable consequence of being held to be within the jurisdiction of our courts. Mr. Justice Dodge in Fond du Lac C. & B. Co. v. Hemmingsen, 141 Wis. 70, 123 N. W. 640, speaking for the court said: "Although our statute may in terms authorize a suit against a foreign corporation whenever the plaintiff resides in this state and the summons can be served upon some officer or agent of the corporation

those statutes must be ineffective to give jurisdiction unless [fol. 107] the presence of such officer or agent within our borders amounts to presence of the corporation, * * *. It is however uniformly recognized that when a person, corporate or natural, does place itself within our territorial limits, jurisdiction over his or its person may be obtained to adjudicate personal liabilities to such extent as said statutes may authorize."

Petitioner has called our attention to International Harvester Co. v. Kentucky, 234 U. S. 579, Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U. S. 516, James-Dickensen Co. v. Harry, 273 U. S. 119, and other cases of similar import which do support its contention that the corporation was not so within the state as to be subject to service of process unless they are distinguishable from the case at bar. International Harvester Co. v Kentucky, supra, was one in which service was attempted upon an agent in a state where the corporation had expressly refused to be present but did continue doing business there to a considerable extent and therefore service was held good In the Rosenberg Bros. & Co. Inc. v. Curtis Brown Co. case supra, the president of the foreign corporation entered New York state for the purpose of purchasing goods. The question there was whether at the time of the service of process it was doing business within the state of New York in such manner and to such extent as to warrant the inference that it was present there. The Supreme Court of the United States held that it was not so situated by reason of what it had done as to be subject to jurisdiction in New York.

While it may be a close question, it is quite obvious that a corporation sending its agent, although its president, into another state to purchase articles might not go with him, and would therefore be in a very different situation so far as jurisdiction over it is concerned by the local courts [fol. 108] from that in which the petitioner here is, for here the petitioner deliberately entered the state for the purpose of negotiating with reference to the very matter out of which the suit arises. As we understand the James-Dickensen Co. case so far as it relates to this question, it is distinguishable by reason of the fact that special authority to take the corporation into Illinois relative to business sued

upon, was lacking. While the Wisconsin rule must yield to the effect of the decisions referred to, and although our rule may be truly said to be close to the line marked by these decisions, we feel that under the distinctions pointed out, it ought still to control us as to the presence of a corporation under the circumstances disclosed in this record. In the cases relied upon by the petitioner the officer or agent appearing in the foreign state came there with powers so limited that there is good reason for saying the corporation was not present. It seems that the holding would not be proper where the corporation sends into a neighboring state its president for the purpose of winding up, compromising or settling a matter in difference between it and a resident of that state, having conferred on him full power and authority in that particular. Were the balance due in favor of the foreign corporation, it could appeal to the local courts to enforce its rights.

A corporation is by law given a character which amounts in a legal and limited sense to the image or equivalent of an individual. It is limited by the manner of its creation and the practical methods it must conform to in doing its business, but it may contract, sue, defend, and generally carry on the business for which it is organized. In the nature of things it must act through persons who represent it. There is just as definitely a group will and ability to form a plan or intention to act as is found in an individual. In order to avoid confusion and to prevent imposition the corporation's domicile and the place where it may be said to be [fol. 109] found are fixed as definitely as can be and at the same time prevent undue advantage and injustice. The effect of our legislation with relation to jurisdiction over foreign corporations amounts to this, a corporation is found within the state when its president or other chief officer, vice president, secretary, cashier, treasurer, director or managing agent is within the state and conducting business for such corporation; it is here for the purposes relating to the business it has come to transact. Had the business transacted been that of Mr. Rupprecht and had he been found in the state of Wisconsin, certainly service could have been made upon him. The only way the corporation whose business he was authorized to transact could act in relation thereto was by doing so by and through its representative. He had authority to speak on behalf of the

company, for the time being the company was manifesting its presence in his person and acts, it was doing its business here in Wisconsin and protecting its interests through him. As an individual Rupprecht might have come into the state without bringing the corporation with him, but as an officer coming here by direction of the corporation to manage and do the particular business of the corporation, he did bring the corporation with him. To hesitate so to hold is making a question of a patent fact. Fond du Lac C. & B. Co. v. Henningsen, 141 Wis. 70; Premo Specialty Mfg. Co. v. Jersey Creme Co., 280 Fed. 352; 43 L. F. A. n. s., 1015.

The corporation has been admitted into the general economy of things as a normal business unit competing with individuals and there does not appear to be much danger of undue advantage being taken of it if treated as a legal personality protected to the extent it is by the Wisconsin statute. If a corporation desires to stay out of a certain jurisdiction it may easily do so by refusing to have [fol. 110] its officers or agents enter the state for the purpose of doing business for it in that state. In this it has no greater burden and no greater advantage than would have had an individual under similar circumstances. It is privileged to do business anywhere and everywhere upon complying with the laws of the jurisdiction into which it enters. Quoting again from the Fond du Lac C. & B. Co. case, supra, the president, "at that time and for that definite purpose was the corporation which therefore was present in this state. Hence, there is no obstacle in the inherent limits on the powers of the state, or in any prohibitions to the federal constitution, to the acquisition of jurisdiction by our courts by personal service of their process on the defendant present within our borders. The service in fact made was that authorized by our statute and was such as to satisfy all requirements of due process of law."

We are of the opinion that the plain language of the statute as interpreted by Fond du Lac C. & B. Co. v. Henningsen, 141 Wis. 70, applied to the facts in this case, compels a ruling that the service was good. The decision in Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, appears to be applicable. The statute there under consideration provided for service on one, "who adjusts or settles a loss." The opinion relates that the company sent its

representative with authority to settle the claim sued on into the state of Missouri. There was a bona fide attempt to settle the controversy between the parties and when it failed service of summons was made. This service was held good.

We agree with the conclusion reached by the trial court and hold that the return made shows the petitioner not entitled to a writ of prohibition.

By the Court: The demurrer to the return is overruled and writ denied.

[fol. 111] In Supreme Court of Wisconsin

[Title omitted]

Order Amending Mandate—Nov. 22, 1932

Ordered that the mandate heretofore entered herein, be, and the same is hereby, amended by adding thereto the following: "Temporary restraining order dissolved."

[fol. 112] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 113] Supreme Court of the United States

Statement of Points to be Relied Upon and Stipulation of Parts of the Record to be Printed—Filed Dec. 31, 1932

Comes now the Consolidated Textile Corporation, the appellant in the above entitled action, and adopts its assignment of errors as its statement of the points to be relied upon, and states it expects to rely upon each and all of the assignments of errors which are attached to the record filed in this case.

It is hereby stipulated between the respective parties hereto, that the following parts of the record need not be printed and that the same are not necessary for a considera-

tion of the assignment of errors, or any of them, and that the remaining portions of the record shall be printed:

(1) Omit motion to quash alternative writ of prohibition, page 86 of the record, and insert in lieu thereof the following: "Here appears motion to quash alternative writ of prohibition."

(2) Omit admission of service of petition for writ of prohibition, alternative writ of prohibition and motion to quash alternative writ of prohibition, pages 87 and 88 of the record, and insert in lieu thereof the following: "Here appears admission of service of petition for writ of prohibition, alternative writ of prohibition and motion to quash alternative writ of prohibition."

(3) Omit motion to withdraw motion to quash alternative writ of prohibition and supporting affidavit, pages 95, 96, 97 and 98 of the record, and insert in lieu thereof the following: "Here appears motion to withdraw motion to quash alternative writ of prohibition and supporting affidavit."

[fol. 114] (4) Omit bond on appeal, pages 5 to 12, inclusive, of the record, and insert in lieu thereof the following: "Here appears bond on appeal duly approved by the Chief Justice of the Supreme Court of the State of Wisconsin."

(5) Omit Præcipe for transcript on said appeal, pages 44 to 47, inclusive, of the record, and insert in lieu thereof the following: "Here appears præcipe for transcript on said appeal, together with admission of service."

(6) Omit Admission of service of copies of the petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction of the Supreme Court of the United States, pages 19 to 21, inclusive, of the record, and insert in lieu thereof the following: "Here appears admission of service of copies of the petition for appeal, order allowing appeal, assignment of errors and statement as to jurisdiction of the Supreme Court of the United States."

(7) Omit Exhibit "A" to "F," inclusive, attached to alternative writ of prohibition, part of page 85 of the record, and insert in lieu thereof the following: "Here appears Exhibits "A" to "F," inclusive, which are identical with Exhibits "A" to "F," inclusive, attached to the petition,

pp. 49-56 incl., for writ of prohibition." (Pages 57 to 77, incl., Exhibits.)

It is further stipulated that the Clerk may proceed to docket the above entitled action at once.

Dated December 23, 1932.

George B. Hudnall, Louis A. Lecher, Frank L. McNamara, Sml. O. Arnold, Counsel for Appellant. Walter L. Gold, Ray T. McCann, Morris Karon, Counsel for Appellee.

[fol. 115] [File endorsement omitted.]

Endorsed on cover: File No. 37,284. Wisconsin Supreme Court. Term No. 587. Consolidated Textile Corporation, appellant, vs. John J. Gregory, Judge of the Circuit Court of Milwaukee County. Filed December 31, 1932. File No. 37,284.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Statute of the State of Wisconsin, the validity of which is involved	3
Date of the judgment sought to be reviewed and the date upon which the application for appeal was presented	4
The nature of the case and the judgment of the court were such as to bring the case within the jurisdictional provisions relied upon	5
(*a*) Statement of facts	5
(*b*) The appeal is from a final judgment in the highest court of a State in which a decision in the suit could be had	7
(*c*) The validity of a statute of the State of Wisconsin was drawn in question, on the ground of its being repugnant to the Constitution of the United States, and the decision of the Supreme Court of the State of Wisconsin was in favor of the validity of the statute	8
(*d*) The question presented on appeal is a substantial Federal question	11

Table of Cases Cited.

Bandini Petroleum Co. v. Superior Court, 284 U. S. 8, 14	8
Bank of America v. Whitney Bank, 261 U. S. 171	12
Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 677-678	11
Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333	12
Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 231-232	11
Chicago, R. I. & P. R. Co. v. Perry, 259 U. S. 548, 551	11
Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245	12
Conley v. Mathieson A. Works, 190 U. S. 406	13
Detroit & M. R. Co. v. Mich. R. Com., 240 U. S. 564, 570-571	8
Home Ins. Co. v. Dick, 281 U. S. 397, 407	11
International H. Co. v. Kentucky, 234 U. S. 579	12
James-Dickinson Farm Mtge. Co. v. Harry, 273 U. S. 119	12

Page

Louisville & N. R. Co. v. Chatters, 279 U. S. 320 ..... 12, 13
Michigan Central R. Co. v. Mix, 278 U. S. 492, 494 8
Missouri ex rel. Mo. Ins. Co. v. Gehner, 281 U. S. 313, 320 11
Missouri ex rel. St. Louis B. & M. R. Co. v. Taylor, 266 U. S. 200, 206-207 8
Morris & Co. v. Skandinavia Ins. Co., 279 U. S. 405, 408-409 13
Old Wayne Mut. L. Assoc. v. McDonough, 204 U. S. 8 13
Pennsylvania F. Ins. v. Gold Issue M. & M. Co., 243 U. S. 93 13
Peterson v. Chicago, R. I. & P. R. Co., 205 U. S. 364 12
Philadelphia & R. R. Co. v. McKibbin, 243 U. S. 264, 265 12
Pullman's Palace Car Co. v. Missouri P. R. Co., 115 U. S. 587, 597 13
Riverside & Dan River Cotton Mills Co. v. Menefee, 237 U. S. 189 12
Robert Mitchell Furn. Co. v. Seldon Breck Cons. Co., 257 U. S. 213, 215-216 13
Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U. S. 516 12
Simon v. Southern R. Co., 236 U. S. 115 13
St. Louis S. W. R. Co. v. Alexander, 227 U. S. 218 12

STATUTES CITED.

Act of January 31, 1928 (Chapter 14, 45 Stat. 54) 2
Act of April 26, 1928 (Chapter 440, 45 Stat. 466) 2, 3
Judicial Code, Section 237, as amended by the Act of February 13, 1925 (Chapter 229, 43 Stat. 936), effective May 13, 1925 ..... 1, 2, 8, 11
Wisconsin Statutes, Section 262.09 (Subsection 13) (1931) pp. 1970-1971 ..... 3, 4, 9, 10
United States Constitution, 14th Amendment 9, 10

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1932.

No. 587

CONSOLIDATED TEXTILE CORPORATION,
A CORPORATION, APPELLANT,

vs.

JOHN J. GREGORY, JUDGE OF THE CIRCUIT COURT OF MILWAUKEE COUNTY.

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

In compliance with Rule 12 of the Supreme Court of the United States, the appellant submits its statement disclosing the basis on which it is contended that the Supreme Court of the United States has jurisdiction to review on appeal the judgment entered by the Supreme Court of the State of Wisconsin in favor of the appellee and against the appellant.

I. Statutory Provisions Believed to Sustain the Jurisdiction of the Supreme Court of the United States.

The appellant relies upon the provisions of Section 237 of the Judicial Code (as amended by Act of Febru-

ary 13, 1925, Chapter 229, 43 Stat. 936, effective May 13, 1925), the Act of January 31, 1928, Chapter 14, 45 Stat. 54, and the Act of April 26, 1928, Chapter 440, 45 Stat. 466. These sections provide as follows:

Section 237 of the Judicial Code (as amended by Act of February 13, 1925, Chapter 229, 43 Stat. 936, effective May 13, 1925):

> "(*a*) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Act of January 31, 1928, Chapter 14, 45 Stat. 54:

> "That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.
>
> SEC. 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of

record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: *Provided, however,* That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

Act of April 26, 1928, Chapter 440, 45 Stat. 466:

" 'An Act in reference to writs of error', approved January 31, 1928, Public, Numbered 10, Seventieth Congress, be, and it is hereby, amended to read as follows:

'SEC. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error'."

II. The Statute of the State of Wisconsin, the Validity of Which is Involved.

The State Statute the validity of which is challenged by the appellant is Subsection (13) of Section 262.09 of the Wisconsin Statutes, and is found in the official printed edition of the Wisconsin Statutes for the year 1931, at pages 1970-1971.

The statute provides as follows:

> "262.09. Service on corporations. Actions against corporations shall be commenced in the same manner as personal actions against natural persons. The summons and the accompanying complaint or notice aforesaid shall be served, and such service held of the same effect as personal service on a natural person, by delivering a copy thereof as follows:
>
> * * * * * * *
>
> (13) If against any other foreign corporation, to any such officer being within the state, or to any agent having charge of or conducting any business therefor in this state, or any trustee or assignee of such corporation, or upon the secretary of state, as provided in section 226.02. But such service can be made upon a foreign corporation only either when it has property within the state or the cause of action arose therein, or the cause of action exists in favor of a resident of the state, and upon the secretary of state only when the cause of action arises out of business transacted in this state or when the defendant has property therein."

III. Date of the Judgment Sought to be Reviewed and the Date Upon Which the Application for Appeal was Presented.

The judgment of the Supreme Court of the State of Wisconsin, which the appellant seeks to have reviewed by the Supreme Court of the United States, was entered on the 9th day of November, 1932. The application for appeal was presented to the Chief Justice of

the Supreme Court of the State of Wisconsin on the 6th day of December, 1932.

IV. The Nature of the Case and the Judgment of the Court Were Such as to Bring the Case Within the Jurisdictional Provisions Relied Upon.

(a) Statement of Facts.

The Consolidated Textile Corporation is a corporation organized under the laws of the State of Delaware, with its office and principal place of business in New York City. It is not licensed to do business in the State of Wisconsin. It has never done any business in the State of Wisconsin. It has no property or place of business or office or agent in the State of Wisconsin. None of its officers are residents of the State of Wisconsin. Frederick K. Rupprecht, its president, is a resident of the City, County and State of New York.

On January 14, 1932, an action was commenced in the Circuit Court for Milwaukee County wherein Katherine Gold is plaintiff and Consolidated Textile Corporation is defendant. The service of the summons was made upon Frederick K. Rupprecht while he was in the City of Milwaukee, State of Wisconsin, under the following circumstances: Walter L. Gold, an attorney of this court, represented the alleged owners of $9,200.00 principal amount of the first mortgage bonds of the Consolidated Textile Corporation, to-wit: Lillie Mock, Cecelia Alshuler, Crowley Company, Inc., Katherine Gold and Walter Gold, on whose behalf an action was commenced on January 19, 1931, in the

Municipal Court in the City, County and State of New York by one Edythe H. Stegeman against the Consolidated Textile Corporation to recover interest due on said bonds on December 1, 1930. No judgment has been entered in said action, although a motion for summary judgment was made.

Prior to the institution of the suit in New York, a committee was formed for the protection of the holders of the first mortgage bonds of the Consolidated Textile Corporation. The committee was of the opinion that the best interests of the holders of all bonds required that no judgment be entered in the action pending in New York.

Subsequently Frederick K. Rupprecht, the president of the Consolidated Textile Corporation, arranged with Mr. Gold for a conference in Milwaukee to discuss the situation of the bondholders. On January 14, 1932, Mr. Rupprecht came to Milwaukee for the sole purpose of discussing with Mr. Gold the New York action and to present to Mr. Gold facts which, in Mr. Rupprecht's opinion, would dissuade Mr. Gold from further proceeding with the action in New York. On the same day Mr. Rupprecht conferred with Mr. Gold in Milwaukee, and at the conclusion of the conference Mr. Rupprecht was served with summons and complaint.

The complaint in the lower court alleges that Katherine Gold is the holder of certain first mortgage 20 year 8% sinking fund convertible gold bonds issued by the Consolidated Textile Corporation "payable to bearer 20 years after date at the principal office of the Chase National Bank in the City of New York,

with interest''; that the interest on said bonds has not been paid and is now past due; that by reason of default in payment of interest the principal amount of said bonds likewise became due. Plaintiff demands judgment for the principal amount of said bonds, together with unpaid interest.

No part of the transaction involving the issue of first mortgage 2 year 8% sinking fund convertible gold bonds by the Consolidated Textile Corporation took place in the State of Wisconsin.

The Consolidated Textile Corporation owns all of the stock of the Consolidated Selling Company, which is a corporation organized under the laws of the State of Delaware, with its office and principal place of business in the City, County and State of New York. The Consolidated Selling Company is not licensed to do business in the State of Wisconsin. The only business conducted by the Consolidated Selling Company in the State of Wisconsin is interstate in character and is conducted by means of nonresident agents, who solicit orders in Wisconsin, which are accepted in New York City.

(*b*) *The appeal is from a final judgment in the highest court of a State in which a decision in the suit could be had.*

In the Circuit Court for Milwaukee County, Wisconsin, the defendant, Consolidated Textile Corporation, appeared specially for the sole purpose of objecting to the jurisdiction of the court. The Circuit Court held that it had jurisdiction, whereupon the defendant applied to the Supreme Court of the State of Wiscon-

sin for a writ of prohibition restraining the plaintiff from further prosecuting said action in the Circuit Court.

The Supreme Court of the State of Wisconsin issued an alternative writ of prohibition, to which the respondent made return. The Consolidated Textile Corporation demurred to the return. On the 9th day of November, 1932, the Supreme Court of the State of Wisconsin handed down a decision, in which it held that the Circuit Court for Milwaukee County had jurisdiction of the action and that the petition for a writ of prohibition had been denied. On the same day final judgment denying the writ of prohibition was entered.

The Supreme Court of the State of Wisconsin is the court of last resort in the State of Wisconsin and is the highest court of the State in which a decision in the suit could be had. This appeal, therefore, is an appeal from a final judgment within the meaning of Section 237 of the Judicial Code (as amended by Act of February 13, 1925, Ch. 229, 43 Stat. 936, effective May 13, 1925). *Baudini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, 14; *Michigan Central R. Co.* v. *Mix*, 278 U. S. 492, 494.

The judgment is also a judgment from which a writ of error would lie under Section 237 of the Judicial Code prior to the amendment of February 13, 1925. *Missouri ex rel. St. Louis B. & M. R. Co.* v. *Taylor*, 266 U. S. 200, 206-207; *Detroit & M. R. Co.* v. *Mich. R. Com.*, 240 U. S. 564, 570-571.

(*c*) *The validity of a statute of the State of Wisconsin was drawn in question on the ground of its*

being repugnant to the Constitution of the United States and the decision of the Supreme Court of the State of Wisconsin was in favor of the validity of the statute.

In its petition for a writ of prohibition the Consolidated Textile Corporation specifically alleged that subsection (13) of Section 262.09 of the Wisconsin Statutes was unconstitutional in that it deprived the petitioner of its property without due process of law, in violation of the 14th Amendment to the Federal Constitution. The Supreme Court in its opinion specifically held that the statute was valid and constitutional.

The petition of the Consolidated Textile Corporation alleged that Section 262.09 (13) of the Wisconsin Statutes violated the provisions of the 14th Amendment to the Federal Constitution by depriving it of its property without due process of law in that it authorized service to be made on an officer of an unlicensed foreign corporation which had never done business in the State of Wisconsin and which had no property or place of business or office or officer or agent in the State of Wisconsin when the officer was temporarily in the State of Wisconsin for the purpose of compromising an action instituted by a resident of Wisconsin against the foreign corporation in a sister State.

The petition alleged that Section 262.09 (13) of the Wisconsin Statutes violated the provisions of the 14th Amendment to the Federal Constitution by depriving Consolidated Textile Corporation of its property without due process of law in that it authorized serv-

ice to be made on an officer of an unlicensed foreign corporation which had never done business in the State of Wisconsin and which had no property or place of business or office or officer or agent in the State of Wisconsin when the officer was temporarily in the State of Wisconsin for the purpose of compromising an action instituted by a resident of Wisconsin against the foreign corporation in a sister State, and where such foreign corporation owned all of the stock of a subsidiary unlicensed foreign corporation which did only an interstate business in Wisconsin through non-resident agents who solicited orders in Wisconsin which were accepted in a sister State.

Lastly, the petition alleged that Section 262.09 (13) of the Wisconsin Statutes violated the provisions of the 14th Amendment to the Federal Constitution by depriving the Consolidated Textile Corporation of its property without due process of law in that it authorized service to be made upon the officer of an unlicensed foreign corporation which had never done business in the State of Wisconsin and which had no property or place of business or office or officer or agent in the State of Wisconsin when the officer was temporarily in the State of Wisconsin for the purpose of compromising an action instituted by a resident of Wisconsin against the foreign corporation in a sister State, and where the cause of action sued upon in Wisconsin arose out of a transaction outside the State.

The Supreme Court of the State of Wisconsin did not pass upon the two latter constitutional objections. The court did, however, reject the first constitutional objection, and held that the service on the president

of the Consolidated Textile Corporation was authorized under Section 262.09 (13) of the Wisconsin Statutes, and that the statute was valid and constitutional.

It thus appears that the provisions of Section 237 of the Judicial Code (as amended by Act of February 13, 1925, Ch. 229, 43 Stat. 936, effective May 13, 1925), requiring the constitutional question to be raised in the lower court and to be passed upon adversely to the Federal claim, have been fully satisfied.

Home Ins. Co. v. *Dick*, 281 U. S. 397, 407;

Brinkerhoff-Faris Trust & Sav. Co. v. *Hill*, 281 U. S. 673, 677-678;

Missouri ex rel. Mo. Ins. Co. v. *Gehner*, 281 U. S. 313, 320;

Chicago, R. I. & P. R. Co. v. *Perry*, 259 U. S. 548, 551;

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S. 226, 231-232.

(d) The question presented on appeal is a substantial Federal question.

The appeal squarely presents the question as to the constitutionality of a state statute which permits service to be made upon the officer of an unlicensed foreign corporation which does no business in the State, has no property or place of business or officer or office or agent in the State, and where the service was had upon the President of such corporation while he was temporarily in the State on an isolated visit for the purpose of compromising a suit brought against said corporation in a sister state. The decisions of the United

States Supreme Court uniformly hold that service had under such circumstances deprives the foreign corporation of its property without due process of law.

Rosenberg Bros. & Co. v. *Curtis Brown Co.*, 260 U. S. 516;

James-Dickinson Farm Mtge. Co. v. *Harry*, 273 U. S. 119;

Bank of America v. *Whitney Bank*, 261 U. S. 171;

International H. Co. v. *Kentucky*, 234 U. S. 579;

Riverside & Dan River Cotton Mills Co. v. *Menefee*, 237 U. S. 189;

St. Louis S. W. R. Co. v. *Alexander*, 227 U. S. 218;

Louisville & N. R. Co. v. *Chatters*, 279 U. S. 320, 324-325;

Philadelphia & R. R. Co. v. *McKibbin*, 243 U. S. 264, 265;

Commercial Mut. Acc. Co. v. *Davis*, 213 U. S. 245.

The doing of business in the State by a subsidiary unlicensed foreign corporation does not constitute the doing of business in the State by the parent corporation.

Cannon Mfg. Co. v. *Cudahy Packing Co.*, 267 U. S. 333;

Philadelphia & R. R. Co. v. *McKibbin*, 243 U. S. 264;

Peterson v. *Chicago R. I. & P. R. Co.*, 205 U. S. 364;

Pullman's Palace Car Co. v. *Missouri P. R. Co.*, 115 U. S. 587, 597;

Conley v. *Mathieson A. Works*, 190 U. S. 406;

Louisville & N. R. Co. v. *Chatters*, 279 U. S. 320, 326.

The further question is presented as to whether a State may constitutionally provide by statute for service on the officer of an unlicensed foreign corporation which does no business in the State, and has no property or place of business or office or officer or agent in the State, when such officer has made an isolated visit to a State for the purpose of compromising an action instituted against the corporation in a sister State, where the cause of action arose out of a transaction outside the State. The United States Supreme Court has also held in these circumstances that such service is unconstitutional in that it deprives the corporation of its property without due process of law.

Old Wayne Mut. L. Asso. v. *McDonough*, 204 U. S. 8;

Robert Mitchell Furn. Co. v. *Seldon Breck Cons. Co.*, 257 U. S. 213, 215-216;

Pennsylvania F. Ins. v. *Gold Issue M. & M. Co.*, 243 U. S. 93;

Louisville & N. R. Co. v. *Chatters*, 279 U. S. 320;

Simon v. *Southern R. Co.*, 236 U. S. 115;

Morris & Co. v. *Skandinavia Ins. Co.*, 279 U. S. 405, 408-409.

We respectfully submit that the United States Supreme Court has jurisdiction over the appeal of the Consolidated Textile Corporation.

Respectfully submitted,

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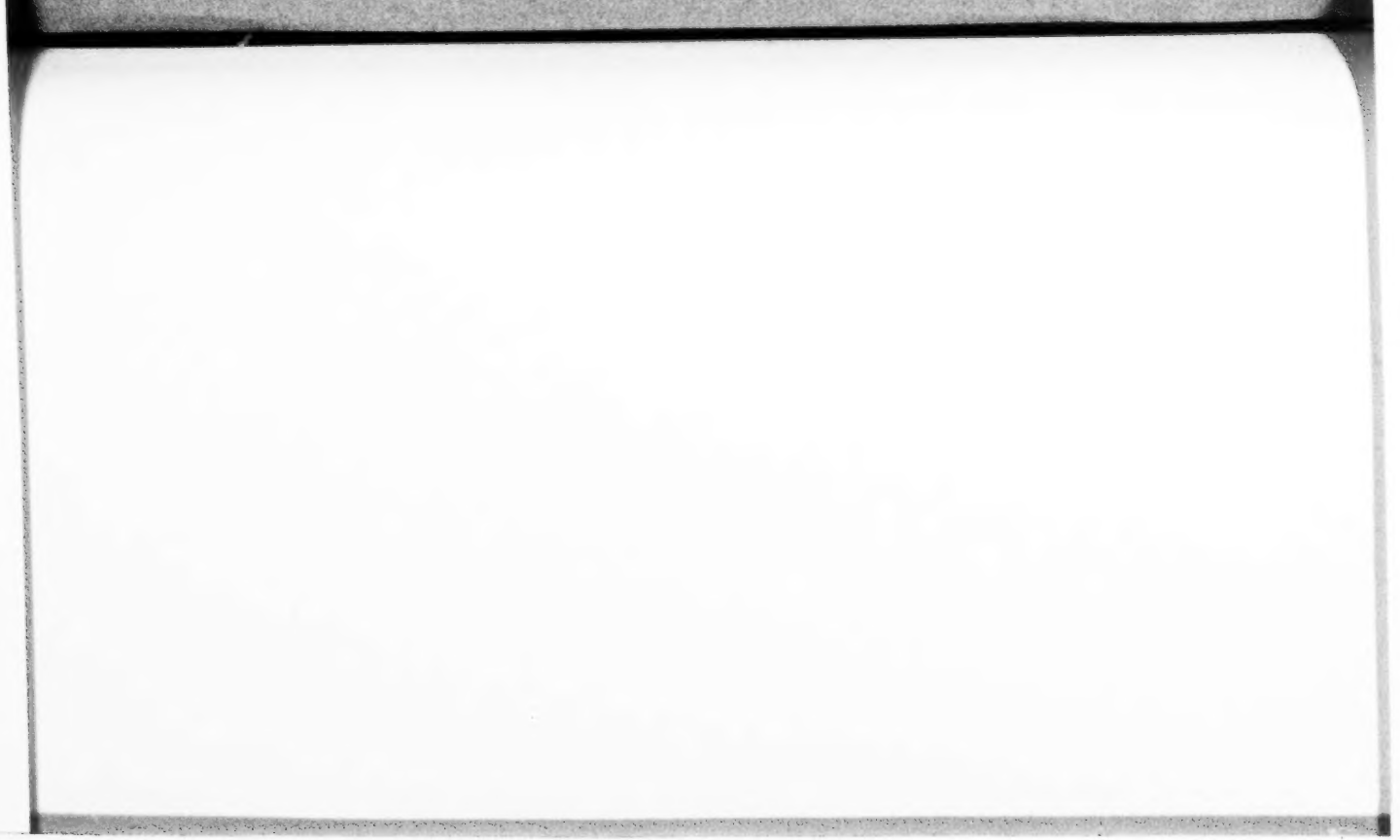
LOUIS A. LECHER,
FRANK L. McNAMARA,
SUEL O. ARNOLD.
Counsel for Appellant.



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SUPREME COURT of the UNITED STATES

October Term, 1932

No. 587

CONSOLIDATED TEXTILE CORPORATION, a corporation,

Appellant,

vs.

JOHN J. GREGORY, Judge of the Circuit Court for Milwaukee County,

Appellee.

Brief of Appellant in Opposition to Appellee's Motion to Dismiss or Affirm.

GEORGE B. HUDNALL,
LOUIS A. LECHER,
FRANK L. McNAMARA,
SUEL O. ARNOLD,
Counsel for Appellant.

INDEX.

Page

Statement of the Case 1

Issues Involved 1

Argument:

I. A State Cannot Obtain Jurisdiction Over a Foreign Corporation Unless the Corporation Actually Conducts a Continuous Course of Business in the State 3-8

II. A State Court Cannot Obtain Jurisdiction Over an Unlicensed Foreign Corporation in a Suit Brought to Recover on a Cause of Action Arising Outside of the State 8-9

Conclusion 9

LIST OF CASES CITED.

Bagdon vs. Phil. & Reading C. I. Co., 217 N. Y. 432..... 7

Barrow S. S. Co. vs. Kane, 170 U. S. 100..... 9

Commercial Mut. Acc. Co. vs. Davis, 213 U. S. 245..... 4

Conn. Mut. Life Ins. Co. vs. Spratley, 172 U. S. 602..... 4

Creager vs. P. F. Collier & Son Co., 36 Fed. (2nd) 783 (D. C. Tex.) 8

Eastman Kodak Co. vs. Southern Photo Materials Co., 273 U. S. 359 7

Green vs. Chicago, B. & Q. R. Co., 205 U. S. 530..... 7

International Harvester Co. vs. Kentucky, 234 U. S. 579 ..... 4, 5, 6

List of Cases Cited—*Continued.*

	Page
James-Dickinson Farm Mtge Co. vs. Harry, 273 U. S. 119	4, 5
Louisville & N. R. Co. vs. Chatters, 279 U. S. 320	4, 8
Morris & Co. vs. Skandinavia Ins. Co., 279 U. S. 405	8
New England Mut. L. Ins. Co. vs. Woodworth, 111 U. S. 138	9
New York L. E. & W. R. Co. vs. Estill, 147 U. S. 591	9
Pa. F. Ins. Co. vs. Gold Issue Min. & Mill. Co., 243 U. S. 93	8
Phila. & R. R. Co. vs. McKibbin, 243 U. S. 264	4
Riverside & Dan River Cotton Mills vs. Menefee, 237 U. S. 189	4, 6
Robert Dollar Co. vs. Canadian C. & F. Co., 220 N. Y. 270	7
Robert Mitchell Furn. Co. vs. Seldon Breck Const. Co., 257 U. S. 213	8
Rosenberg Bros. & Co. vs. Curtis Brown Co., 260 U. S. 516	4, 5, 6
St. Louis S. W. R. Co. vs. Alexander, 227 U. S. 218	7
Tauza vs. Susquehanna Coal Co., 220 N. Y. 259	7
Tetley, Sletten & Dahl vs. Rock Falls Mfg. Co., 176 Wis. 400	6

SUPREME COURT of the UNITED STATES

October Term, 1932.

No. 587

CONSOLIDATED TEXTILE CORPORATION, a corporation,

Appellant,

vs.

JOHN J. GREGORY, Judge of the Circuit Court for Milwaukee County,

Appellee.

Brief of Appellant in Opposition to Appellee's Motion to Dismiss or Affirm.

Pursuant to paragraph 3 of Rule 7 of the Rules of the Supreme Court of the United States, the appellant hereby files its brief in opposition to the appellee's motion to dismiss or affirm.

The appellee's statement against jurisdiction of the Supreme Court of the United States was served on appellant on December 20, 1932.

ISSUES INVOLVED.

There is no issue of fact presented upon this motion. It is undisputed that the appellant is a Delaware corporation, with its office and principal place of business in the City, County and State of New York; that it has no property or place of business or office or officer or agent in the State of Wisconsin; that the president of the appellant came to the State of Wisconsin for the purpose of settling the claims of the holders of bonds issued by the appellant; that service was made upon the president of the appellant while he was in the State of Wisconsin for the purpose of settling such claims.

It is also undisputed that the appellant has never conducted any business in the State of Wisconsin; that it owns all of the stock of the Consolidated Selling Company, a Delaware corporation, with its office and principal place of business in the City, County and State of New York; that the Consolidated Selling Company is not licensed to do business in the State of Wisconsin, has no property or place of business or office or officer in the State of Wisconsin, but transacts an interstate business in the State of Wisconsin by means of non-resident agents, who solicit orders in the State of Wisconsin, which are accepted at its office in New York.

Counsel for the appellee, in their brief, suggest that it is not necessarily true that the cause of action sued upon in the Circuit Court for Milwaukee County, Wisconsin, arose out of a transaction outside the State of Wisconsin. The petition for a writ of prohibition filed in the Supreme Court of the State of Wisconsin expressly alleges that the cause of action arose out of a transaction outside the State of Wisconsin (see paragraph 8 of the petition, R. 53-54), and the plaintiff's complaint filed in the Circuit Court for Milwaukee County (see Exhibit B, attached to petition for

a writ of prohibition (R. 58-60), shows upon its face that the cause of action arose outside the State. Counsel's suggestion, therefore, may be disregarded since no issue of fact in this respect is raised.

We may lay out of the case all questions relating to the timeliness of the appellant's appeal and the appellant's compliance with all applicable Federal statutes and rules of the Supreme Court of the United States governing the appellant's right to appeal. Counsel for the appellee tacitly concede that all of these requirements have been satisfied.

The appellee predicates his motion to dismiss or affirm solely on the ground that a substantial Federal question is not presented. In our brief in support of the jurisdiction of the Supreme Court of the United States, we pointed out that a substantial Federal question was presented, and cited authorities in support of our position. This brief will be confined to answering the arguments contained in the appellee's brief in opposition to jurisdiction of the Supreme Court of the United States.

ARGUMENT.

I. A State Cannot Obtain Jurisdiction Over a Foreign Corporation Unless the Corporation Actually Conducts a Continuous Course of Business in the State.

Counsel in their brief (page 5) argue that the sole test to be applied in determining whether a state may constitutionally assume jurisdiction over an unlicensed corporation is the character and power of the representative of the corporation who is served with process. They say that when any officer or agent of an unlicensed foreign corporation, acting within the authority committed to him, comes into a state for the purpose of representing a corporation,

the corporation is present and subject to the jurisdiction of the state.

The argument advanced by counsel is contrary to all of the modern decisions in this court. This court has uniformly held that a state cannot obtain jurisdiction over an unlicensed foreign corporation unless it is actually doing business in the state.

International Harvester Co. vs. Kentucky, 234 U. S. 579, 583;

Phila. & R. R. Co. vs. McKibbin, 243 U. S. 264, 265;

Rosenberg Bros. & Co. vs. Curtis Brown Co., 260 U. S. 516;

James-Dickinson Farm Mtge. Co. vs. Harry, 273 U. S. 119;

Louisville & N. R. Co. vs. Chatters, 279 U. S. 320, 324-325.

Counsel cite in support of their argument, *Riverside & Dan River Cotton Mills vs. Menefee,* 237 U. S. 189. In that case, contrary to counsel's argument, the court squarely held, pages 194-195, that a state cannot obtain jurisdiction over an unlicensed foreign corporation unless it actually does business in the state.

Counsel argue that a mere isolated visit of an officer of a foreign corporation in a state in connection with corporate business constitutes the doing of business in the state by a corporation. In support of their argument, counsel cite *Commercial Mut. Acc. Co. vs. Davis,* 213 U. S. 245, and *Conn. Mut. Life Ins. Co. vs. Spratley,* 172 U. S. 602. Counsel's argument is a *petitio principii.* In each of the cases cited it was conceded that the corporation was doing business in the state (172 U. S. 602 at page 610; 213 U. S. 245, at pages 255-256).

The Supreme Court of the State of Wisconsin in adopting counsel's view (R. 107-108) frankly stated that it was "a close question" and that the rule laid down "may be truly said to be close to the line marked" by the decisions of the Supreme Court of the United States in *International Harvester Co. vs. Kentucky,* 234 U. S. 579; *Rosenberg Bros. & Co. vs. Curtis Brown Co.,* 260 U. S. 516; and *James-Dickinson Farm Mtge. Co. vs. Harry,* 273 U. S. 119. The Supreme Court of the State of Wisconsin states that the test to be applied to determine whether the state court obtained jurisdiction depended upon the character of the officer or agent upon whom service was made, and that if such officer had full power and authority to represent the corporation, the state thereby acquired jurisdiction over the corporation.

Later on in the opinion, the court specifically held that jurisdiction was obtained over a foreign corporation whenever service was obtained upon an officer who was present in the state on business for the corporation (R. 109-110).

The state court found it very difficult to reconcile its statement of the law with the decision in *Rosenberg Bros. & Co. vs. Curtis Brown Co.,* 260 U. S. 516. There the president of an Oklahoma corporation, which was engaged in the sale of merchandise at retail, made trips to New York four times a year for the purpose of purchasing merchandise. On one of these trips service was made upon him in an action brought in the courts of the State of New York. This court held that the Oklahoma corporation was not doing business in the State of New York, and that the service was invalid. The case was distinguished by the Supreme Court of the State of Wisconsin on the ground that the purchasing of merchandise did not constitute the doing of business.

The Supreme Court of the State of Wisconsin has thus laid down the rule that while the purchasing of merchan-

dise in the State of Wisconsin by an officer of a foreign corporation does not constitute the doing of business, the appearance in the State of Wisconsin of an officer of a foreign corporation for the purpose of compromising a claim against the foreign corporation does constitute the doing of business. The court in laying down this rule ignored entirely the mandate of this court in *Rosenberg Bros. & Co. vs. Curtis Brown Co.*, 260 U. S. 516, and *International Harvester Co. vs. Kentucky*, 234 U. S. 579, under which a state is prevented from obtaining jurisdiction over a foreign corporation unless such corporation is actually engaged in a continuous course of business in the state.

Counsel further argue that the decisions of this court which we have cited in support of our position are inapplicable because they are based upon a construction of the Federal statute which requires the corporation "to reside" or "be found" or to be "an inhabitant" of the district in which suit is brought, and because in some of the cases the officer was in the state in his private capacity. These facts do not at all impair the value of these cases as authority for the proposition for which they were cited, nor do the decisions cited rest upon the interpretation of a Federal statute. All of the cases specifically hold that a state may not, consistently with the due process clause of the Federal Constitution, assume jurisdiction over a foreign corporation unless it actually does business in the state. Thus, in *Riverside & Dan River Cotton Mills vs. Menefee*, 237 U. S. 189, the question was presented to the court upon a writ of error to the Supreme Court of the State of North Carolina.

Counsel's argument is refuted by the decision of the Wisconsin Supreme Court in *Tetley, Sletten & Dahl vs. Rock Falls Mfg. Co.*, 176 Wis. 400 (a case which was not cited by the Supreme Court of the State of Wisconsin in its opinion), in which it was held (pages 403, 405-406) that

jurisdiction is not obtained over a foreign corporation unless it "is actually doing business within the state."

To the same effect:

Bagdon vs. Phil. & Reading C. I. Co., 217 N. Y. 432;

Robert Dollar Co. vs. Canadian C. & F. Co., 220 N. Y. 270;

Tauza vs. Susquehanna Coal Co., 220 N. Y. 259.

Counsel also cite *Green vs. Chicago, B. & Q. R. Co.*, 205 U. S. 530; *St. Louis S. W. R. Co. vs. Alexander*, 227 U. S. 218, and *Eastman Kodak Co. vs. Southern Photo Materials Co.*, 273 U. S. 359. These cases do not afford any comfort to the appellee. In the first case, which was an action instituted in a Federal circuit court, the question presented related to jurisdiction of a Federal circuit court. The second case, which was brought in a state court in New York and which was removed to the Federal court, squarely holds that a foreign corporation must be engaged in business in a state in order to confer jurisdiction on the state courts. In the third case, an action was instituted in the Federal court under the Sherman Act. The sole question presented was the jurisdiction of a Federal district court. The question as to deprivation of property under the due process clause of the Federal Constitution was not raised, and could not have been raised. In that case the court calls attention to the fact that the question as to the jurisdiction of a Federal court in an action brought under the Sherman Act is entirely different from that involved where an action is instituted against a foreign corporation in a state court. Furthermore, it conclusively appeared in that case that the corporation was actually engaged in conducting business in that state.

Finally, we call the court's attention to the exhaustive opinion of Hutchison, District Judge, in *Creager vs. P. F. Collier & Son Co.,* 36 Fed. (2nd) 783 (D. C. Texas), at pages 786-788. In that case all of the decisions of the Supreme Court of the United States in respect of jurisdiction of a state over a foreign corporation are cited, and a conclusion reached adverse to the contention of the appellee.

II. A State Court Cannot Obtain Jurisdiction Over an Unlicensed Foreign Corporation in a Suit Brought to Recover on a Cause of Action Arising Outside of the State.

Counsel state (page 7 of their brief) that the cases cited by the appellant to sustain its position that the state cannot obtain jurisdiction over an unlicensed foreign corporation in a suit brought to recover on a cause of action arising outside of the state, are inapplicable because they involve questions arising out of service upon an officer designated by state statutes for that purpose. Counsel has entirely misconceived the effect of these decisions. The character of the party served is wholly immaterial. The decisions uniformly hold that jurisdiction cannot be obtained over an unlicensed foreign corporation where the cause of action arose outside the state. The *ratio decidendi* is that while a foreign corporation may, by transacting business in a state, subject itself to the jurisdiction of the state, such jurisdiction does not extend to actions to recover on a cause of action arising outside the state.

Louisville & N. R. Co. vs. Chatters, 279 U. S. 320; 325-328;

Morris & Co. vs. Skandinavia Ins. Co., 279 U. S. 405, 408-409;

Robert Mitchell Furn. Co. vs. Seldon Breck Const. Co., 257 U. S. 213, 215-216;

Pa. F. Ins. Co. vs. Gold Issue Min. & Mill. Co., 243 U. S. 93, 95-96.

Counsel cite *Barrow S. S. Co. vs. Kane,* 170 U. S. 100; *New York L. E. & W. R. Co. vs. Estill,* 147 U. S. 591; and *New England Mut. L. Ins. Co. vs. Woodworth,* 111 U. S. 138, in support of their contention. In the two latter cases the question as to whether a state may obtain jurisdiction over a foreign corporation where the cause of action arose outside the state was not presented to or passed upon by this court. In the first case an action was commenced in a Federal circuit court, and the only question presented was whether the court had jurisdiction over a cause of action arising in a foreign country. Clearly, none of these decisions are in point.

CONCLUSION.

We respectfully submit that the Supreme Court of the State of Wisconsin was in error in holding that the courts in the State of Wisconsin obtained jurisdiction over the appellant, Consolidated Textile Corporation. The decision of the Supreme Court of the State of Wisconsin deprives the appellant of its property without due process of law. A substantial Federal question is thus presented which requires the denial of the appellee's motion to dismiss or affirm.

Respectfully submitted,

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LOUIS A. LECHER,
FRANK L. McNAMARA,
SUEL O. ARNOLD,
Counsel for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 587

CONSOLIDATED TEXTILE CORPORATION,
Appellant,

vs.

JOHN J. GREGORY, Judge of the Circuit Court of Milwaukee County.

On Appeal from the Supreme Court of the State of Wisconsin.

BRIEF FOR APPELLANT, CONSOLIDATED TEXTILE CORPORATION.

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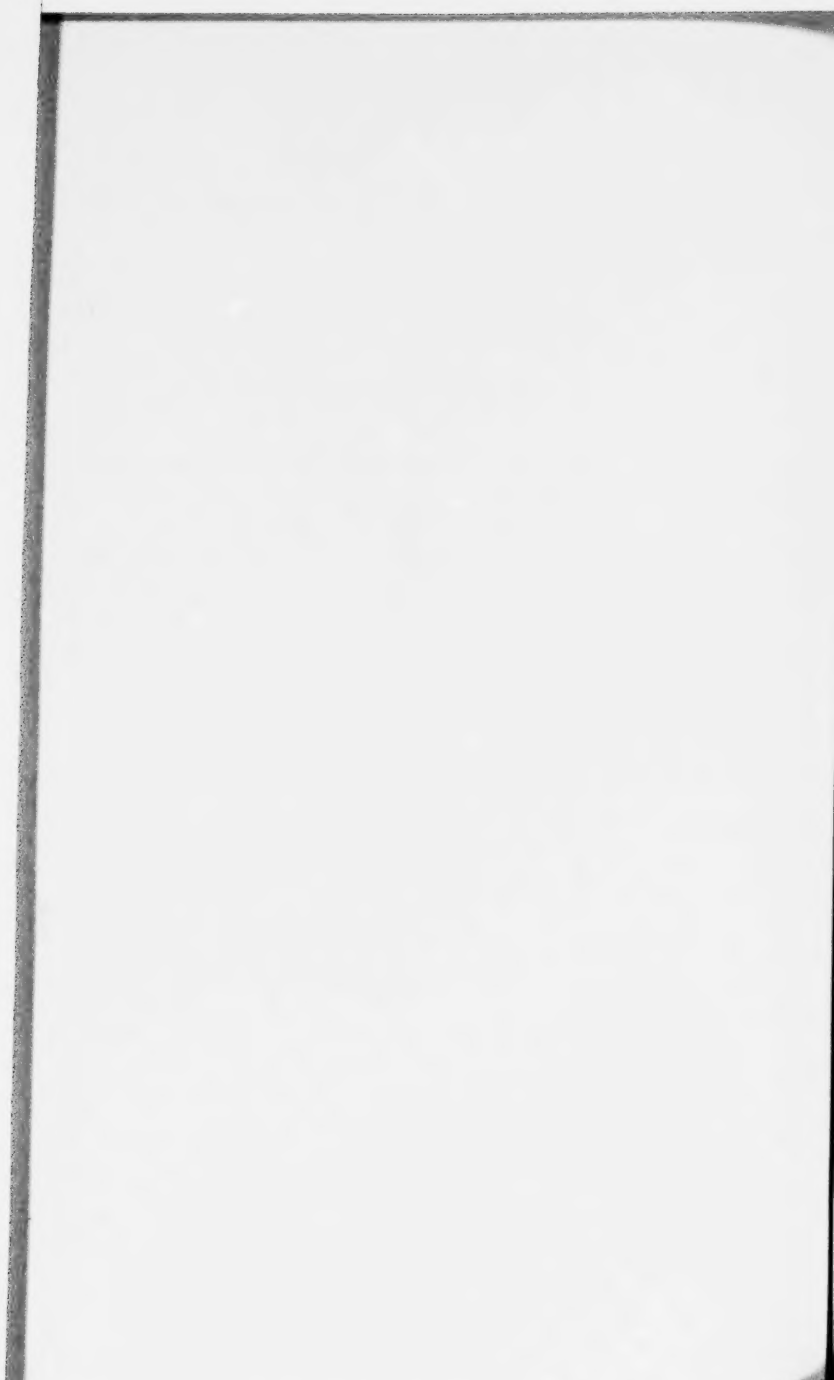

INDEX.

	PAGE
Table of Cases and Statutes	i
Reference to Opinion of the Court below	1
Statement as to Jurisdiction	1
Statement of the Case	5
Specifications of Error	15
Summary of the Argument	16
Argument	21
Conclusion	50

Table of Cases and Statutes.

Abbeville Electric L. & P. Co. *v.* Western El. S. Co., 61 S. C. 361; 39 S. E. 559 40

A. Harvey's Sons Mfg. Co. *v.* Sterling M. Co., 247 Mich. 317; 225 N. W. 538 40

Bagdon *v.* Phila. & Reading Coal & Iron Co., 217 N. Y. 432 ..... 19, 29, 41

Bandini Co. *v.* Superior Court, 284 U. S. 8 5

Bank of America *v.* Whitney Bank, 261 U. S. 171 ..... 17, 26

Bank of Augusta *v.* Earle, 13 Pet. 519 21

Brush Creek C. & M. Co. *v.* Morgan-Gardner El. Co., 136 Fed. 505 40

Buffalo Sandstone Brick Co. *v.* American Sandstone Brick Machinery Co., 141 Fed. 211 ..... 18, 38

Cannon Mfg. Co. *v.* Cudahy Co., 267 U. S. 333 ..... 17, 19, 24

PAGE

Commercial Mutual Accident Co. *v.* Davis, 213 U. S. 245 ..... 34, 37
Conley *v.* Mathieson Alkali Works, 190 U. S. 406....16, 20, 23
Connecticut Mutual Life Insurance Co. *v.* Spratley, 172 U. S. 602..... 37
Craig *v.* Welsh Motor Car Co., 165 Fed. 554..... 18, 38

Dollar Co. *v.* Canadian C. & F. Co., 220 U. S. 270..... 29
Dungan Hood & Co. *v.* Bally, 271 Fed. 517..... 39

Eastman Kodak Co. *v.* Southern P. M. Co., 273 U. S. 359 .....17, 26, 41

Goldey *v.* Morning News, 156 U. S. 518..... 16, 23
Good Hope Co. *v.* Railway Barb Fencing Co., 22 Fed. 635 ..... 18, 38
Green *v.* Chicago, Burlington & Quincy Ry., 205 U. S. 530 .....17, 26, 33

Henry M. Day & Co., Inc. *v.* Schiff, Lang & Co., 278 Fed. 533 ..... 19, 38
Holzer *v.* Dodge Brothers, 233 N. Y. 216.....17, 26, 29
Houston *v.* Filer & S. Co., 85 Fed. 757..... 40
Hoyt *v.* Ogden Portland Cement Co., 185 Fed. 889.... 19, 38

International Harvester Co. *v.* Kentucky, 234 U. S. 579 .....16, 17, 23, 26, 33
In the Matter of the Exercise of Original Jurisdiction of the Supreme Court, 201 Wisc. 123; 229 N. W. 643 5

James-Dickinson Co. *v.* Harry, 273 U. S. 119, 17, 18, 25, 27, 29

Ladd Metals Co. *v.* American Mining Co., 152 Fed. 1008 ..... 18, 38
Louden Machinery Co. *v.* American Malleable Iron Co., 127 Fed. 1008.....18, 38, 39
Louisville & N. R. Co. *v.* Chatters, 279 U. S. 320, 17, 19, 26, 40
Lumbermen's Insurance Co. *v.* Meyer, 197 U. S. 407 37

PAGE

Meade Fibre Co. *v.* Varn, 3 Fed. (2d) 520 39
Mechanical Appliance Company *v.* Castleman, 215 U. S. 437 ..... 16, 23
Michigan Central *v.* Mix, 278 U. S. 492 5
Mitchell Furn. Co. *v.* Selden Breck Co., 257 U. S. 213 19, 41

New Haven P. & B. Co. *v.* Downington M. Co., 130 Fed. 605 40
Noel Construction Co. *v.* George W. Smith & Co., 193 Fed. 492 ..... 19, 38

Old Wayne Mutl. Life Assn. *v.* McDonough, 204 U. S. 8 ..... 19, 41

Painter *v.* Colorado Springs & Cripple Creek Dist. Ry. Co., 127 Mo. App. 248; 104 S. W. 1139 ..... 19, 39
Pennoyer *v.* Neff, 95 U. S. 714 ..... 16, 21
Penna. Fire Ins. Co. *v.* Gold Issue Mining Co., 243 U. S. 93 ..... 19, 41
People's Tobacco Co. *v.* American Tobacco Co., 246 U. S. 79 ..... 17, 20, 25, 26
Peterson *v.* Chicago, Rock Island & Pac. Ry., 205 U. S. 364 20
Phila. & Reading Ry. Co. *v.* McKibbin, 243 U. S. 264 ..... 17, 20, 25
Postal Telegraph Cable Co. *v.* Newport, 247 U. S. 464, 473 15
Premo Specialty Mfg. Co. *v.* Jersey Creme Co., 200 Fed. 352 39
Pullman Car Co. *v.* Missouri Pac. Co., 115 U. S. 587 .. 20

Riverside Mills *v.* Menefee, 237 U. S. 189 ..... 16, 21, 29
Rosenberg Co. *v.* Curtis-Brown Co., 260 U. S. 516, 17, 18, 25, 27, 28

St. Clair *v.* Cox, 106 U. S. 350 ..... 16, 22, 23
St. Louis B. & M. Ry. *v.* Taylor, 266 U. S. 200 5
St. Louis S. W. Ry. Co. *v.* Alexander, 227 U. S. 218 ..... 16, 17, 23, 24, 36

PAGE

St. Louis Wire-Mill Co. *v.* Consolidated Barb-Wire Co., 32 Fed. 802 ..... 18, 38

St. Mary's Oil Engine Co. *v.* Jackson Ice & Fuel Co., 222 Ala. 152; 138 So. 834 40

Simon *v.* Southern Ry. Co., 236 U. S. 115 ..... 19, 41

Smolick *v.* Phila. & Reading Coal Co., 222 Fed. 148 ..... 19, 41

Tauza *v.* Susquehanna Coal Co., 220 N. Y. 259 ..... 17, 26, 29, 47

The Lafayette Ins. Co. *v.* French, 18 How. 340 ..... 16, 23

Truax *v.* Corrigan, 257 U. S. 312 ..... 14, 15

Wilkins *v.* Queens City Savings Bank & Trust Co., 154 Fed. 173 ..... 18, 38

Section 237 Judicial Code; U. S. C. Title 28, Section 344 ..... 2, 3, 5

Statutes of Wisconsin, Section 251.10 4

Statutes of Wisconsin, Section 262.09 (13) 3, 15

Wisconsin Constitution, Article VII, Section 3 4

Supreme Court of the United States

No. 587, October Term, 1932.

Consolidated Textile Corporation,
Appellant,

vs.

John J. Gregory, Judge of the Circuit Court of Milwaukee County.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF FOR APPELLANT.

Reference to Opinion of the Court Below.

The opinion of the Supreme Court of Wisconsin (R. 38) is reported in 245 N. W. 194 (advance sheets of December 14, 1932); it has not yet been reported in the official State reports.

Statement as to Jurisdiction.

Rule 12 of this Court has been complied with, we believe, in the Statement as to Jurisdiction heretofore filed herein. The subject has been also discussed in Appellant's brief in opposition to a motion to dismiss or affirm, the determination of which was postponed to the hearing on

* Unless otherwise stated, italics in this brief are ours.

the merits. For convenience, however, a brief statement on the subject follows:

The appeal is from a final judgment of the Supreme Court of Wisconsin (R. 37) denying a writ of prohibition directed to the Honorable John J. Gregory, Judge of the Circuit Court of Milwaukee County, Wisconsin, and Katherine Gold, restraining them from proceeding further with an action attempted to be brought in said Circuit Court in which Katherine Gold was named as plaintiff and Appellant as defendant, wherein a personal judgment was sought against Appellant. In its petition in the prohibition proceeding in the Supreme Court of Wisconsin (R. 4), Appellant alleged that the Circuit Court of Milwaukee County was without jurisdiction over Appellant because it is a foreign corporation, was not licensed to do, and had not transacted, business in Wisconsin and had no property or agent in that State; that service of process on Appellant's president while temporarily in the State was invalid and that the State statute providing for service of process on foreign corporations, if construed to authorize the service made on Appellant's president as aforesaid, was repugnant to the Due Process clause of the Fourteenth Amendment to the Constitution of the United States (R. 5-6).

The Supreme Court of Wisconsin, after a hearing following the return to an alternative writ of prohibition, held that the service was authorized by the State statute; overruled Appellant's contention that the statute was repugnant to the Due Process clause of the Fourteenth Amendment (Opinion, R. 38) and entered final judgment denying the writ of prohibition (R. 37).

(a) The matter is brought to this Court pursuant to the provisions of Section 237 of the Judicial Code as amended

(U. S. C., Title 28, Section 344), which permits an appeal from a final judgment in any suit in the highest court of the State in which a decision in the suit could be had where is drawn in question the validity of a statute of the State on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity.

(b) The State statute, the validity of which is challenged, is subsection (13) of Section 262.09 of the Wisconsin Statutes and is found in the official printed edition of the Wisconsin Statutes for the year 1931, at pages 1970-71. The material portions of the section are as follows:

> "262.09. Service on corporations. Actions against corporations shall be commenced in the same manner as personal actions against natural persons. The summons and the accompanying complaint or notice aforesaid shall be served, and such service held of the same effect as personal service on a natural person, by delivering a copy thereof as follows:
>
> * * * * * *
>
> (13) If against any other foreign corporation, to any such officer being within the state, or to any agent having charge of or conducting any business therefor in this state, or any trustee or assignee of such corporation, or upon the secretary of state, as provided in section 226.02. But such service can be made upon a foreign corporation only either when it has property within the state or the cause of action arose therein, or the cause of action exists in favor of a resident of the state, and upon the secretary of state only when the cause of action arises out of business transacted in this state or when the defendant has property therein."

(c) The date of the final judgment of the Supreme Court of Wisconsin sought to be reviewed is November 9,

1932 (R. 37). The application for appeal was presented to, and allowed by, the Chief Justice of the Supreme Court of Wisconsin on December 6, 1932 (R. 1, 2).

The proceeding for a writ of prohibition was a proceeding under the original jurisdiction of the Supreme Court of Wisconsin (R. 37) and its judgment denying the writ is a final judgment of the highest court of that State in which a decision in the proceeding can be had. Section 3, Article VII, of the Constitution of Wisconsin provides:

> "The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, *quo warranto*, certiorari, and other original and remedial writs, and to hear and determine the same" (Wisconsin Statutes, 1931, p. 31).

The constitutional grant of original jurisdiction and power to the Supreme Court is supplemented by Section 251.10 of the Wisconsin Statutes, which provides:

> "251.10. Original jurisdiction; writs in vacation. In addition to the writs mentioned in section 3 of article 7 of the constitution, the supreme court shall have power to issue writs of prohibition, *supersedeas*, *procedendo* and all other writs and process not specially provided by statute which may be necessary to enforce the due administration of right and justice throughout the state; and any justice of said court in vacation shall, on good cause shown, have power to allow writs of error, *supersedeas* and certiorari, and also to grant injunctional orders."

See *In the Matter of the Exercise of the Original Jurisdiction of the Supreme Court,* 201 Wisc. 123; 229 N. W. 643.

An appeal from a final judgment in a prohibition proceeding is an appeal from a final judgment within the meaning of Section 237 of the Judicial Code as amended.

Bandini Co. vs. *Superior Court,* 284 U. S. 8, 14;
Michigan Central vs. *Mix,* 278 U. S. 492, 494;
St. Louis B. & M. Ry. vs. *Taylor,* 266 U. S. 200, 206-207.

Statement of the Case.

The cause was heard on demurrer (R. 36) to the return to the alternative writ of prohibition, the record before the Supreme Court consisting of Appellant's petition for writ of prohibition (R. 4), together with annexed exhibits (comprising the record on which the Circuit Court acted), the alternative writ (R. 26) and the return thereto (R. 32).

The material facts are as follows:

Appellant is a Delaware corporation, having its office and principal place of business in New York City, New York (R. 1, 2). It is not licensed to do business in the State of Wisconsin (R. 13). It has never done any business in that State (R. 12). It has no property or place of business or office or agent in the State (R. 13). Frederick K. Rupprecht, its President, is a resident of the City, County and State of New York (R. 13).

On January 14, 1932, service of process was attempted to be made upon Appellant in seven actions in the Circuit Court for Milwaukee County, Wisconsin, in one of which

Katherine Gold purported to be plaintiff and Appellant was named defendant, by delivering the copies of the summonses and complaints to Mr. Rupprecht while he was in the office of Mr. Walter L. Gold, a member of the firm acting as attorney for the plaintiffs, where he had gone to confer with Mr. Gold in an effort to convince him of the wisdom of withholding the entry of judgment in an action which had been brought against Appellant in the Municipal Court of the City of New York, N. Y. (R. 5, 13) and of seeking to arrange with the holders of the bonds represented by him to deposit them with a Bondholders Protective Committee which held approximately seventy per cent. of the issue then outstanding (R. 13, 14, 15, 19, 20).

The New York action was brought in January, 1931, by one Edythe H. Stegman to recover interest due December 1, 1930, on certain First Mortgage Bonds issued by Appellant (R. 13, 14). Mr. Gold owned some of said bonds and represented the owners of the others (R. 13, 14). Prior to January 14, 1932, a motion by plaintiff for a summary judgment in the New York action had been granted but judgment had not been entered (R. 14). It was the judgment of the bondholders' committee and of Mr. Rupprecht that the interest of the bondholders would not be served by action at that time to enforce the mortgage or otherwise (R. 14). In the interest of the Committee and Appellant corporation, as well as in his own interest (R. 14), Mr. Rupprecht had sought to arrange an interview with Mr. Gold in Milwaukee for the purpose of acquainting him with facts which Mr. Rupprecht believed would dissuade Mr. Gold from causing judgment to be entered in the New York action and hoped might influence him to have the said bonds deposited with the Committee. To that end, Mr.

Zinman, the New York attorney for the plaintiff in the suit pending there, was requested to communicate with Mr. Gold and arrange the desired conference (R. 14). Mr. Gold replied to a letter from Mr. Zinman to the effect that he saw no purpose to be gained from a conference in Milwaukee (R. 14). On Monday, January 11, 1932, Mr. Rupprecht informed Mr. Zinman that he would be in Chicago the latter part of the week and requested Mr. Zinman to telephone Mr. Gold asking permission for Mr. Rupprecht to call on him in Milwaukee for the purpose of advising him of the situation in an endeavor to persuade him not to have judgment entered in the New York action (R. 14). On the following day it occurred to Mr. Gold that if Mr. Rupprecht should call upon him, Mr. Gold would have him served with process in Wisconsin, whereupon, he instructed Mr. Morris Karon, one of his lawyer associates, to prepare the summonses and complaints in the seven actions (R. 22).

On January 14, 1932, Mr. Rupprecht called on Mr. Gold solely for the purpose of discussing with him the New York action and of presenting to him the facts which Mr. Rupprecht believed would persuade Mr. Gold to refrain from entering judgment in the action and to deposit his own bonds and recommend to those whom he represented the deposit of their bonds with the bondholders' committee (R. 15). Mr. Gold, however, declined to listen, stated he was not interested in the facts, and knew them to be otherwise, and before Mr. Rupprecht left attempted to serve him with the summonses and complaints, being himself the plaintiff in one of the actions (R. 15).

The complaint in the action by Katherine Gold claimed the right to recover interest due June 1, 1931 and December 1, 1931, and also the principal amounts of First Mortgage

Bonds issued by the Appellant, notwithstanding that by their terms the bonds are payable June 1, 1941, at the principal office of The Chase National Bank in the City of New York, State of New York; the allegation as to maturity being merely that the plaintiff is informed and believes that the holder of a bond may always declare due the principal thereof if the interest be in default and that she has made such declaration (R. 10-12).

Appellant appeared specially (R. 5, 24) in said action and moved to vacate the service on the ground that the Court was without jurisdiction because defendant is a Delaware corporation, was not licensed to do business in Wisconsin, had not in fact done business in that State, had no property or place of business or office or agent in the State; that Mr. Rupprecht, president of Appellant, was a resident of New York; that the attempted service had been made while he was temporarily in Milwaukee and that to give effect thereto would constitute a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 5).

Appellant's motion was denied by an order entered on June 30, 1932 (R. 24, 25); and on the following day, without notice to Appellant that the motion had been decided, a default judgment was entered for plaintiff and against defendant (Appellant here) for the full amount prayed in the complaint (R. 25). Appellant's attorneys were unaware that the motion had been decided until July 12, 1932, when notice of the entry of the order of June 30 and of the judgment on July 1 was received from the attorneys for the plaintiff (R. 25). Thereafter the Court, after a hearing on an order to show cause, on its own motion set aside the judgment and granted a five-day stay within which to

enter a general appearance, demur, answer or otherwise plead to the plaintiff's complaint or to take further proceedings in said action (R. 25-26).

Thereupon, Appellant filed its petition for writ of prohibition in the Supreme Court of Wisconsin (R. 4), in accordance with the procedure in respect of the original jurisdiction of that Court, in which petition, or in the exhibits annexed thereto, the facts above stated were set forth. The petition also alleged that service of summons on a foreign corporation was controlled by the Statutes of the State of Wisconsin, that subsection (13) of Section 262.09 of the Wisconsin Statutes was the only statute in any manner dealing with service of summons in such an action, that the service attempted was not authorized thereby, and that if it were, the statute was unconstitutional in that it deprived Appellant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States (R. 6). The same facts and claims of the Appellant were set forth in the alternative writ which was thereupon issued by the Supreme Court (R. 26).

A motion to quash the alternative writ was filed in due course by respondents (R. 32). Before hearing that motion, respondent Honorable John J. Gregory, Judge of the Circuit Court of Milwaukee County, Wisconsin, filed a return to the alternative writ, which was adopted by respondent Katherine Gold (R. 32, 36). In order to expedite the proceeding, the parties stipulated that the motion to quash be withdrawn, that the return be amended as specified and that the matter be heard on Appellant's demurrer to the amended return (R. 36-37).

The Court sustained the jurisdiction of the Circuit Court, overruled Appellant's contention that such result

was repugnant to the due process clause of the Fourteenth Amendment and entered final judgment denying the writ of prohibition (R. 37, 38-44).

Because of certain contentions in the Court below, the following facts which would otherwise be immaterial, are also noted:

Annexed as an exhibit to the Appellant's petition for writ of prohibition is copy of the affidavit of Frederick K. Rupprecht (R. 12) in support of the motion to set aside the service (R. 12). Appellant also annexed to its petition, at the request of the attorneys representing Katherine Gold and "to obviate the necessity of filing a return to the alternative writ" (R. 6), copy of the affidavit of Walter L. Gold and copy of affidavit of Morris Karon used on the motion (R. 17, 23). In Mr. Gold's affidavit, the statement is made that at the conference with Mr. Rupprecht, the latter "stated to affiant that he was in Milwaukee to see Mr. Loeffer of Goll & Frank and Gimbel Bros., who were customers of Consolidated Textile Corporation" (R. 19), and that at such conference "Mr. Rupprecht tried to interest affiant in the sale of Consolidated Textile Corporation's mills at Henderson, Kentucky" (R. 19), that "a large part of the conversation was devoted by Mr. Rupprecht in discussing the properties of the company at Henderson" and various details concerning the company's properties in Henderson and "the reason for the desire of the company to sell this property" and that Mr. Rupprecht said "that his company would be glad to pay affiant well for his services in trying to effect such sale and would pay him a commission if a sale were made" (R. 19).

Mr. Gold also said "Affiant has been informed that through Consolidated Selling Co., Inc., which is the selling

agency for Consolidated Textile Corporation and is a subsidiary wholly controlled by Consolidated Textile Corporation and is an agent of Consolidated Textile Corporation, the Consolidated Textile Corporation sells goods in Wisconsin, to wit, to Gimbel Bros. in Milwaukee and Sears, Roebuck & Co. in Milwaukee" (R. 22).

In the return to the alternative writ of prohibition Judge Gregory of the Circuit Court stated (Paragraph 11, R. 35):

> "Respondent further shows to the court that *upon full and fair consideration of the affidavits of both the plaintiff and the defendant* upon the said motion, I found that said Frederick K. Rupprecht, president of said defendant corporation, *was sent by said defendant corporation to Wisconsin to attempt to settle the seven individual claims of Wisconsin bondholders* against said defendant corporation and at the time of the service of process in the above case upon him he was in Wisconsin on the business of said defendant corporation, and that he was then engaged in conducting business of said corporation in Wisconsin; *that Mr. Rupprecht told Mr. Gold* that he was then also in Wisconsin on the business of said corporation with several of its customers in Wisconsin; *and that in addition said defendant corporation had been doing business in Wisconsin through a wholly owned and controlled subsidiary, Consolidated Selling Company, Inc.*" (This paragraph of the return was amended by stipulation (R. 36) by inserting the words "that Mr. Rupprecht told Mr. Gold.")

Notwithstanding that the statements above quoted from the affidavit of Mr. Gold supply the only possible basis (other than Mr. Rupprecht's conference with Mr. Gold re-

garding the New York action) for the foregoing statements of Judge Gregory, we are somewhat nonplussed to find that, in their brief in behalf of Appellant in opposition to Appellee's motion to dismiss or affirm, Appellant's counsel fell into one of the same errors as did Judge Gregory, as the result of which, on page 2 of such brief, the statement is made "that the president of the Appellant came to the State of Wisconsin for the purpose of settling the claims of the holders of bonds issued by Appellant"; and by asserting in their "Statement as to Jurisdiction" (p. 10) that Mr. Rupprecht was in Wisconsin "for the purpose of compromising an action instituted by a resident of Wisconsin against the foreign corporation in a sister State"; (p. 11) that the president was temporarily in the State "for the purpose of compromising a suit brought against said corporation in a sister State," and (p. 13) that Appellant's officer had "made an isolated visit to the State for the purpose of compromising an action instituted against the corporation in a sister State." Notwithstanding the foregoing, in the same Statement (p. 6) it is correctly said that "On January 14, 1932, Mr. Rupprecht came to Milwaukee for the *sole purpose* of discussing with Mr. Gold the New York action and to present to Mr. Gold facts which, in Mr. Rupprecht's opinion, would dissuade Mr. Gold from further proceeding with the action in New York." Although the variation in the statements may be inconsequential, we point it out in a spirit of frankness.

If we understand correctly Appellee's attitude, it is that her position is improved because, as she claims, (a) Mr. Rupprecht was in Wisconsin for the purpose of settling the claims upon which the Wisconsin actions were based and stated that he intended calling upon customers of

Appellant resident there; (b) Appellant's subsidiary, Consolidated Selling Co., Inc., sold merchandise to residents of, or those transacting business within, that State.

As to (a), it suffices to say that in Mr. Rupprecht's affidavit, in the petition for the writ of prohibition and in the alternative writ it is definitely stated that Appellant had transacted no business whatsoever in the State of Wisconsin, that Mr. Rupprecht's sole purpose in coming to Milwaukee was to confer with Mr. Gold with reference to the New York action and, incidentally, to seek to prevail upon him to deposit and influence others to deposit bonds with the Committee; also that Mr. Rupprecht did not on his visit to Milwaukee in January, 1932, or at any other time, confer with Gimbel Bros. in the City of Milwaukee or with any other mercantile establishment there (R. 6, 7, 13-15, 28-29). Accordingly, even though Mr. Gold's statement were true, that Mr. Rupprecht told him that he came to talk with customers, if he did not do so, no jurisdictional importance can be attached to the abortive intent. This appears to have been the view of the Supreme Court of Wisconsin because it based its conclusion solely upon the fact that Mr. Rupprecht's conference with Mr. Gold constituted the transaction of business within the State sufficient to give the Circuit Court jurisdiction over Appellant (R. 40, 41).

As to (b), it is alleged in the petition for the writ of prohibition that:

> "The Consolidated Selling Company is a corporation organized under the laws of the State of Delaware with its office and principal place of business in the City, County and State of New York; that your petitioner owns all of the stock of the said Consolidated Selling Company; that said Consolidated Selling Company is not licensed to do business

> in the State of Wisconsin and that the only business conducted by the Consolidated Selling Company in Wisconsin is interstate in character and is conducted by means of non-resident agents who solicit orders in Wisconsin which are accepted in New York City" (R. 7, 28-29).

As against this direct and positive statement, Mr. Gold merely says "that he has been informed" that Appellant conducts business in Wisconsin through Consolidated Selling Co., Inc. The source of Mr. Gold's information is not disclosed and no fact whatsoever is mentioned lending any color to the statement of the Circuit Judge that Appellant was transacting business in the State through its subsidiary; and, although Judge Gregory's statement is referred to in the narrative of facts preceding the opinion of the Supreme Court (R. 39), the succeeding portion of the opinion indicates clearly that, as mentioned above, its conclusion that Appellant was doing business in Wisconsin is based solely upon Mr. Rupprecht's visit.

In its brief on motion to dismiss or affirm, Appellee asserts that the foregoing facts are admitted by Appellant's demurrer to the return. But paragraph 11 of the return states a conclusion based upon the affidavits of plaintiff and defendant, true copies of which, as stated in the return (R. 33) are attached to the petition (R. 12-23). The demurrer admits that the Circuit Judge made the statement but does not admit that it correctly reflects statements in the two affidavits which are a part of the record and may be consulted by this Court.

> "* * * it is clear that in a case like the present, where the issue is whether a state statute in its application to facts which are set out in detail in the

> pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the State Supreme Court in this regard. The only respect in such a case in which this court is bound by the judgment of the State Supreme Court is in the construction which that court puts upon the statute." *Truax* v. *Corrigan,* 257 U. S. 312, 324-325.

See also *Postal Telegraph Cable Co.* v. *Newport,* 247 U. S. 464, 473.

Specifications of Error.

The Supreme Court of Wisconsin erred:

1. In holding that the Circuit Court of the State of Wisconsin could obtain jurisdiction over an unlicensed foreign corporation which does no business in the State by service of process on its president who was temporarily within the State in its behalf solely to procure the withholding of judgment in an action pending against it in another State.

2. In holding that Section 262.09 (13) of the Wisconsin Statutes as construed by it does not deprive Appellant of its property without due process of law.

Summary of the Argument

I

A state court cannot acquire personal jurisdiction over a foreign corporation, without its consent, unless the corporation is carrying on business in the state of such character and to such extent as warrant the inference that it has subjected itself to the jurisdiction of the state and is present therein

Determination of personal rights of a corporation by a court having no jurisdiction over it, is a denial of due process of law

Pennoyer v. *Neff*, 95 U. S. 714;
Riverside Mills v. *Menefee*, 237 U. S. 189.

The test of a state court's jurisdiction over a foreign corporation without its consent is whether or not it is transacting business within the state

The Lafayette Ins. Co. v. *French*, 18 How. 340;
St. Clair v. *Cox*, 106 U. S. 350;
Goldey v. *Morning News*, 156 U. S. 518;
Conley v. *Mathieson Alkali Works*, 190 U. S. 406;
Mechanical Appliance Company v. *Castleman*, 215 U. S. 437;
St. Louis S. W. Ry. Co. v. *Alexander*, 227 U. S. 218;
International Harvester Co. v. *Kentucky*, 234 U. S. 579;
Riverside Mills v. *Menefee*, 237 U. S. 189.

The business transacted must be of such character and extent as warrant the inference that the corporation has subjected itself to the jurisdiction of, and is present in, the state

St. Louis S. W. Ry. v. *Alexander,* 227 U. S. 218;
Cannon Mfg. Co. v. *Cudahy Co.,* 267 U. S. 333;
Rosenberg Co. v. *Curtis-Brown Co.,* 260 U. S. 516;
James-Dickinson Co. v. *Harry,* 273 U. S. 119;
Phila. & Reading Ry. Co. v. *McKibbin,* 243 U. S. 264;
People's Tobacco Co. v. *Am. Tobacco Co.,* 246 U. S. 79;
Green v. *Chicago, Burlington & Quincy Ry.,* 205 U. S. 530;
Bank of America v. *Whitney Bank,* 261 U. S. 171;
Louisville & N. R. Co. v. *Chatters,* 279 U. S. 320.

The business conducted within the state must be a substantial part of the main business of the foreign corporation and there must have been continuity in connection therewith

International Harvester Co. v. *Kentucky,* 234 U. S. 579, 585;
Eastman Kodak Co. v. *Southern P. M. Co.,* 273 U. S. 359, 370, 374;
Tauza v. *Susquehanna Coal Co.,* 220 N. Y. 259, 266, 267;
Holzer v. *Dodge Brothers,* 233 N. Y. 216, 221.

II

Appellant was not doing business in the State of Wisconsin in such manner and to such extent as warrant the inference that it was present there

A single conference by its president temporarily in the state regarding an action pending in another state constituted the manner and extent of the business transacted by Appellant in Wisconsin

Recent controlling decisions of this Court establish that this was not sufficient transaction of business to subject Appellant to the jurisdiction of the state

James-Dickinson Co. v. *Harry*, 273 U. S. 119;
Rosenberg Co. v. *Curtis-Brown Co.*, 260 U. S. 516.

This case is not distinguishable on the ground that Appellant's president was in the state to settle controversies and that the action arose out of the same subject matter

The president was not sent to settle and did not attempt to settle claims against the corporation

The action brought against Appellant in Wisconsin had no relation to the claim which was the subject matter of the president's conference

Even if Appellant's president had been engaged in attempts to compromise and settle claims against it, that would not have constituted the transaction of business within the state of such character and extent as to subject Appellant to the jurisdiction of the state court

Good Hope Co. v. *Railway Barb Fencing Co.*, 22 Fed. 635;
St. Louis Wire-Mill Co. v. *Consolidated Barb Wire Co.*, 32 Fed. 802;
Louden Machinery Co. v. *American Malleable Iron Co.*, 127 Fed. 1008;
Wilkins v. *Queens City Savings Bank & Trust Co.*, 154 Fed. 173;
Buffalo Sandstone Brick Co. v. *American Sandstone Brick Machinery Co.*, 141 Fed. 211;
Ladd Metals Co. v. *American Mining Co.*, 152 Fed. 1008;
Craig v. *Welsh Motor Car Co.*, 165 Fed. 554;

Hoyt v. *Ogden Portland Cement Co.*, 185 Fed. 889;

Noel Construction Co. v. *George W. Smith & Co.*, 193 Fed. 492;

Henry M. Day & Co., Inc. v. *Schiff Lang & Co.*, 278 Fed. 533;

Painter v. *Colorado Springs & Cripple Creek Dist. Ry. Co.*, 127 Mo. App. 248, 104 S. W. 1139.

Appellant not having voluntarily subjected itself to jurisdiction of the Wisconsin court, such jurisdiction could be exercised only in respect of actions arising out of business transacted in the state

Louisville & N. R. Co. v. *Chatters*, 279 U. S. 320, 325;

Mitchell Furn. Co. v. *Selden Breck Co.*, 257 U. S. 213;

Penna. Fire Ins. Co. v. *Gold Issue Mining Co.*, 243 U. S. 93;

Simon v. *Southern Ry. Co.*, 236 U. S. 115;

Old Wayne Mutl. Life Assn. v. *McDonough*, 204 U. S. 8;

Smolick v. *Phila. & Reading Coal Co.*, 222 Fed. 148;

Bagdon v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432.

To sustain jurisdiction over Appellant it was essential not only that its president be acting as its agent in the state but also that Appellant be actually engaged in the transaction there of business of such nature and extent as to subject it to state jurisdiction

Appellant would not be amenable to suit in Wisconsin even if its subsidiary, as claimed, were doing business in the state

Cannon Mfg. Co. v. *Cudahy Co.*, 267 U. S. 333;

Louisville & N. R. Co. v. *Chatters*, 279 U. S. 320, 326;

People's Tobacco Co. v. *Am. Tobacco Co.*, 246 U. S. 79, 87;

Phila. & Reading Ry. Co. v. *McKibbin*, 243 U. S. 264, 268;

Peterson v. *Chicago, Rock Island & Pac. Ry.*, 205 U. S. 364, 391-392;

Conley v. *Mathieson Alkali Works*, 190 U. S. 406, 409;

Pullman Car Co. v. *Missouri Pac. Co.*, 115 U. S. 587, 597.

ARGUMENT.

I.

A State court cannot acquire personal jurisdiction over a foreign corporation, without its consent, unless the corporation is carrying on business in the State of such character and to such extent as warrant the inference that it has subjected itself to the jurisdiction of the State and is present therein.

The early conception that a corporation could have no existence outside the State of its creation (*Bank of Augusta* v. *Earle,* 13 Pet. 519, 588), has given way to the necessities of commercial affairs and it is recognized that a corporation can do business, and become subject to suit, within another State. The fundamental principle that "proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law" (*Pennoyer* v. *Neff,* 95 U. S. 714, 733), is, however, controlling in respect of corporate defendants as well as individuals (*Riverside Mills* v. *Menefee,* 237 U. S. 189, 196); and the test to determine if a particular court can acquire personal jurisdiction over a foreign corporation is whether or not the corporation is doing business in the State within which the court is authorized to act. Lacking that essential, jurisdiction is wanting.

In the *Riverside Mills* case a State court of North Carolina had assumed jurisdiction of an action against a Virginia corporation because service of process had been made within the State upon a resident director in accordance with

a statute of the State, notwithstanding that the corporation was not doing business within the State. This Court reversed a judgment against the defendant and held that the State court had not acquired jurisdiction over the defendant. After referring to *St. Clair* v. *Cox*, 106 U. S. 350, and the numerous cases which had followed and applied it, the Court said (237 U. S. at p. 194):

> "* * * it is indubitably established that the courts of one State may not without violating the due process clause of the Fourteenth Amendment, render a judgment against a corporation organized under the laws of another State where such corporation has not come into such State for the purpose of doing business therein, or has done no business therein, or has no property therein, or has no qualified agent therein upon whom process may be served; and that the mere fact that an officer of a corporation may temporarily be in the State or even permanently reside therein, if not there for the purpose of transacting business for the corporation or vested with authority by the corporation to transact business in such State, affords no basis for acquiring jurisdiction or escaping the denial of due process under the Fourteenth Amendment which would result from decreeing against the corporation upon a service had upon such an officer under such circumstances."

The rule had been announced in a long line of decisions relating to the power of State courts to render personal judgments against foreign corporations. In all of them, by implication or expressly, it was held that the authority of a State court is limited by the territorial confines of the State and that it may exercise jurisdiction over a foreign corporation only when such corporation by the transaction

of its business within the State can be deemed to have subjected itself to its jurisdiction and be present therein.

The Lafayette Ins. Co. v. *French*, 18 How. 340;
St. Clair v. *Cox*, 106 U. S. 350;
Goldey v. *Morning News*, 156 U. S. 518;
Conley v. *Mathieson Alkali Works*, 190 U. S. 406;
Mechanical Appliance Company v. *Castleman*, 215 U. S. 437;
St. Louis S. W. Ry. Co. v. *Alexander*, 227 U. S. 218;
International Harvester Co. v. *Kentucky*, 234 U. S. 579.

In the case last cited, which involved the right of a Kentucky court to pronounce a personal judgment against a foreign corporation, this Court said (234 U. S. at p. 583):

> "* * * when a corporation of one State goes into another in order to be regarded as within the latter it must be there by its agents authorized to transact its business in that State. The mere presence of an agent upon personal affairs does not carry the corporation into the Foreign state. It has been frequently held by this court, and it can no longer be doubted that it is essential to the rendition of a personal judgment that the corporation be 'doing business' within the State. *St. Louis S. W. Ry.* v. *Alexander*, 227 U. S. 218, 226, and cases there cited. As was said in that case, each case must depend upon its own facts, and their consideration must show that this essential requirement of jurisdiction has been complied with and that the corporation is actually doing business within the State."

Although the extent and character of the business that will justify the exercise of such jurisdiction may not be susceptible of exact statement, repeated decisions of this Court have determined that the corporation must be doing within the State business of such character and extent as to support the inference that it has subjected itself to the jurisdiction and is present in the State.

> "A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction, it must appear that the corporation has transacted business in that district to such an extent as to subject it to the jurisdiction and laws thereof.
>
> * * * * * *
>
> "This court has decided each case of this character upon the facts brought before it and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process." *St. Louis S. W. Ry.* v. *Alexander,* 227 U. S. 218, 226, 227.
>
> "The main question for decision is whether, at the time of the service of process, defendant was doing business within the State in such a manner and to such an extent as to warrant the inference that it was present there." *Cannon Mfg. Co.* v. *Cudahy Co.,* 267 U. S. 333, 334-335.

To the same effect is

Rosenberg Co. v. *Curtis-Brown Co.*, 260 U. S. 516, 517.

> "Jurisdiction over a corporation of one State cannot be acquired in another State or district in which it has no place of business and is not found, merely by serving process upon an executive officer temporarily therein, *even if he is there on business of the company.*" *James-Dickinson Co.* v. *Harry*, 273 U. S. 119, 122.

In the four last cited cases, the actions were commenced in state courts and were removed to the federal court after service of process under state statutes. The question for decision, therefore, was the character and extent of business required to be done by a foreign corporation to subject it to the jurisdiction of the state court.

The same question is involved in determining the jurisdiction of a federal court over a corporation foreign to the State within which it is authorized to act, and precisely the same test has been applied.

> "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there." *Phila. & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264, 265.

> "* * * The question as to what constitutes the doing of business in such wise as to make the corporation subject to service of process has been frequently discussed in the opinions of this court, and we shall enter upon no amplification of what has been said. Each case depends upon its own facts. The

general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted." *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 86-87.

To the same effect are

Green v. *Chicago, Burlington & Quincy Ry.*, 205 U. S. 530, 532;

Bank of America v. *Whitney Bank*, 261 U. S. 171, 172;

Louisville & N. R. Co. v. *Chatters*, 279 U. S. 320, 324-5.

The business conducted within the state must be a substantial part of the main business of the foreign corporation and there must have been continuity in connection therewith.

International Harvester Co. v. *Kentucky*, 234 U. S. 579, 585;

Eastman Kodak Co. v. *Southern P. M. Co.*, 273 U. S. 359, 370, 374;

Tauza v. *Susquehanna Coal Co.*, 220 N. Y. 259 267;

Holzer v. *Dodge Brothers*, 233 N. Y. 216, 221.

II.

Appellant was not carrying on business in the State of Wisconsin in such manner and to such extent as warrant the inference that it was present there.

The Court below based its contrary conclusion solely upon Mr. Rupprecht's visit to confer with Mr. Gold (R. 38, *et seq.*). In other words, a single conference between the president of the Appellant corporation and Mr. Gold constituted the manner and extent of the business transacted by Appellant in Wisconsin.

Recent decisions of this Court are controlling and clearly establish the error of the ruling.

In *James-Dickinson Co.* v. *Harry,* 273 U. S. 119, service of process in an action in an Illinois state court was made on the president of a foreign corporation while he was temporarily in the State. The corporation "had not engaged in, or carried on, business within the State." But it was an admitted fact that the *president "was in Illinois on business of the corporation at the time of the service"* (p. 122). It was held that no jurisdiction was obtained over the corporation.

In *Rosenberg Co.* v. *Curtis Brown Co.,* 260 U. S. 516, an action was attempted to be brought against a foreign corporation in a New York state court by serving its president while temporarily in the State. It was claimed that the corporation was actually transacting business in the State, which consisted for the most part of purchases or orders for the purchase of merchandise for its retail store in Oklahoma; that the president was transacting business for the corporation on the occasion of his visit to New York

at the time of service, and numerous instances of the transaction of such business by him at that time were included in the record. This Court held, however, that the facts failed to bring the defendant within the established rule. Speaking for the Court, Mr. Justice Brandeis said:

> "Whether, at the time its president was served with process, he was in New York on business or for pleasure; whether he was then authorized to transact any business there; and to what extent he did transact business while there, are questions on which much evidence was introduced; and some of it is conflicting. But the issues so raised are not of legal significance. The only business alleged to have been transacted by the company in New York, either then or theretofore, related to such purchases of goods by officers of a foreign corporation. Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of the State. Compare *International Harvester Co.* v. *Kentucky*, 234 U. S. 579; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79. And as it was not found there, the fact that the alleged cause of action arose in New York is immaterial. Compare *Chipman, Limited* v. *Thomas B. Jeffery Co.*, 251 U. S. 373, 379" (p. 518).

The court below being (in the language of Appellee's brief on motion to dismiss, p. 7) "committed to the doctrine that a single transaction in the State by a foreign corporation constitutes 'conducting any business' within the State under *section* 262.09 (13), so as to subject the foreign corporation to service of process in the State" (Opinion, R. 39-40), gave reluctant assent to the authority of the cases

above cited* and conceded that they "do support its (Appellant's) contention that the corporation was not so within the state as to be subject to the service of process *unless they are distinguishable from the case at bar*" (Opinion, R. 41).

Referring then to *James-Dickinson Co.* v. *Harrey*, 273 U. S. 119, apparently, the court sought to distinguish it in these words:

> "* * * It seems that the holding would not be proper where the corporation sends into a neighboring state its president for the purpose of winding up, compromising or settling a matter in difference between it and a resident of that state, having conferred on him full power and authority in that particular" (R. 42).

The assumed facts upon which the court below relied in attempting to find a distinction are indicated by the following quotations from its opinion:

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* It is noteworthy that the New York courts since the decision in *Riverside Mills* v. *Menefee*, 237 U. S. 189, have fully accepted the federal rule, (*Bagdon* v. *Phila. & Reading Coal & I. Co.*, 217 N. Y. 432; *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259; *Dollar Co.* v. *Canadian C. & F. Co.*, 220 N. Y. 270; *Holzer* v. *Dodge Brothers*, 233 N. Y. 216), although formerly holding, under the governing statute similar to the Wisconsin statute, that service on an officer of a foreign corporation temporarily and incidentally in the state was valid service on the corporation although neither he nor the corporation was engaged in business in the state. *Dollar Co.* v. *Canadian C. & F. Co.*, 220 N. Y. 270, 276-277.

In the *Holzer* case, the New York Court of Appeals said:

> "The extent to which a corporation must do business in the state to justify the service of process upon its representative is not clearly defined, but under all of the authorities to which my attention has been called, *it must be some substantial part of its main business.* Nothing short of this will justify such service" (233 N. Y. at p. 221).

"Service * * * was made upon * * * the president * * * while he was in the city of Milwaukee for purpose of a conference with the attorneys of Mrs. Gold and of six other bondholders, to attempt to settle the controversy between such bondholders and the Consolidated Textile Corporation" (R. 38).

* * * * * *

"The trial court determined upon the affidavits submitted that the said Rupprecht president of the petitioner, was sent by it to Wisconsin to settle the seven individual claims of the Wisconsin bondholders against said corporation, one of which is the basis of the suit; * * *" (R. 38).

* * * * * *

"* * * here the petitioner deliberately entered the state for the purpose of negotiating with reference to the very matter out of which the suit arises" (R. 41).

Although, as we shall show, the facts thus assumed do not, under the decisions of this Court, justify the conclusion reached, the assumptions themselves are wholly unjustified. The statement of Judge Gregory, which, apparently, is the basis of the court's erroneous narrative, is:

"Respondent further respectfully shows to the court that *from the affidavit* of said Frederick K. Rupprecht, president of said defendant Consolidated Textile Corporation, *it clearly appeared* to the respondent that said Rupprecht as president of the said corporation insisted, against the objection of plaintiff's attorney, Walter L. Gold, upon coming to Wisconsin *for the purpose of attempting to settle a controversy between said Katherine Gold,* a holder of bonds of Consolidated Textile Corporation, and Consolidated Textile Corporation, and controver-

sies between said Consolidated Textile Corporation *and six other bondholders,* who likewise held said corporation's bonds to-wit, *Central Holding Company, Gold Realty Company, Walter L. Gold, Lillie Mock, Cecelia Alshuler and Blanche Oster,* who are all residents of Wisconsin. That the claims of said seven bondholders against Consolidated Textile Corporation were based on bonds issued by said Consolidated Textile Corporation *and sold to said bondholders* for value, and said Consolidated Textile Corporation had defaulted in the payment of interest *and principal* of said bonds *and the total claims of the said seven bondholders exceeded the sum of $15,000"* (R. 34).

Mr. Rupprecht's affidavit will be searched in vain (R. 12-16) for any averment supporting the statement of the learned Judge. Mr. Rupprecht's sole purpose, stated repeatedly, was to confer with Mr. Gold with reference to the New York action brought to recover only the coupons due December 1, 1930 on $9,200 principal amount of bonds (R. pp. 13 and 14, pars. 4 and 6) and to seek to persuade him not to have judgment entered in that action. He was in Wisconsin in behalf of the corporation, (a) only with regard to the New York action and (b) not for the purpose of settling or compromising it, but to cause the plaintiff to appreciate the injury which might result to the corporation and to all bondholders, if judgment were entered therein, and to refrain from entering it. There is not a scintilla of evidence that Mr. Rupprecht was authorized to compromise and settle the claims asserted in the Wisconsin suits, or that he was aware of any intention to assert them until after attempted service of process in that State.

Mr. Gold's affidavit fully corroborates Mr. Rupprecht regarding the purpose of the visit. Thus, he says that Mr. Zinman, the attorney acting for him in the New York action, wrote him with regard to Mr. Rupprecht's proposed conference with Mr. Gold:

> "They (Appellant's attorneys) are desirous of having one of the Company's representatives go out to Milwaukee for the purpose of conferring with you and possibly *persuading you that it is to the best interests of all bondholders that no judgment be entered in this action and that no further proceeding be taken*" (R. 17).

Again, relating Mr. Rupprecht's conversation, Mr. Gold said:

> "After such discussion, Mr. Rupprecht *asked affiant not to have judgment entered by Mr. Zinman in the New York action* of Stegman *vs.* Consolidated Textile Corporation. Mr. Rupprecht stated that he thought it would be to the interest of Edythe H. Stegman and the bondholders represented by affiant, *to have the entry of such judgment postponed.* Mr. Rupprecht asked affiant to telephone to Mr. Zinman at New York *to delay the entry of judgment and affiant finally consented to do so and did telephone to Mr. Zinman and stated to Mr. Zinman that Mr. Rupprecht was in affiant's office and had asked to have entry of judgment delayed for a little while,* and affiant stated to Mr. Zinman that he thought it would be advisable for all concerned *to delay the entry of judgment in New York*" (R. 19).

Mr. Gold's affidavit contains no assertion that Mr. Rupprecht came to discuss, or that he did discuss, a compromise or settlement of the claims made in the Wisconsin

suits until *after Mr. Rupprecht had been served with summonses and complaints in the seven actions,* when, he says, Mr. Rupprecht attempted to persuade Mr. Gold to withdraw the service and made offers looking to the adjustment of the actions (R. 20).

Mr. Rupprecht's solicitation of the deposit of the bonds with the Committee was primarily in its behalf. But even if he were acting as agent for Appellant, the transaction is akin to the solicitation of business, which would not have subjected Appellant to the jurisdiction of the Wisconsin court—especially as it was an isolated transaction unrelated to the ordinary business of Appellant.

Green v. *Chicago, Burlington & Quincy Ry.*, 205 U. S. 530, 533;
International Harvester Co. v. *Kentucky*, 234 U. S. 579, 586-587.

The Wisconsin actions did not arise out of and were only remotely related to the business which took Mr. Rupprecht to Wisconsin. The subject matter of the New York action was interest due December 1, 1930, on certain First Mortgage Bonds of Appellant. Neither Mr. Gold nor Mr. Rupprecht says that any part of their conference was concerned with its adjustment, except to such extent as may be involved in the request that the entry of judgment be deferred. The claims in the action brought by Mrs. Gold were for principal of certain bonds and the interest thereon payable June 1 and December 1, 1931; and the only reference in the record to its adjustment is that some effort in that direction was made after process therein had been served. As the Circuit Judge remarked "said action of Edythe H. Stegman had nothing to do with this (the Gold)

action, or the actions of the other six bondholders aforementioned" (R. 35).

The premises of fact being unfounded, the conclusion of law based thereon, of course, has no application.

But even if it be conceded that the facts were as assumed by the court below, it is submitted that it erred in ruling that an attempt by an officer of a foreign corporation to settle a controversy between it and a resident of the state constitutes the transaction of its business within the state in such manner and to such extent as to warrant the inference that it is present there. It is to be noted that the ruling is not predicated upon the fact that the cause of action arose out of any business of the Corporation transacted in the state. The assumption was that a controversy existed between the resident plaintiff and the foreign corporation which Mr. Rupprecht came into the State to adjust and compromise. It would seem that, if there be any single transaction by a corporation within a state which ought not to subject it to a penalty of foreign service, it should be an attempt to compromise and settle a controversy. Compromises and settlements of controversies are favored by the law and a state policy which would burden them in any manner is anomalous.

After assuming, without a particle of supporting evidence, that Rupprecht had gone to Wisconsin for the purpose of seeking to adjust the claims upon which the suits there were predicated, the court below considered that its ruling was supported by the decision of this Court in *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245. There, an adjuster of the defendant insurance company, a Pennsylvania corporation, went into the State of Missouri to settle an insurance loss resulting from the death of a Mis-

souri resident policy holder. Two questions were presented: (a) whether the agent who entered the state for the purpose of adjusting the loss was a proper party upon whom to make service and (b) whether the corporation was doing business within the state. As to the first, the Court held valid a Missouri statute expressly providing for service upon a foreign insurance company by delivering process within the state to one authorized to adjust or settle a loss; and that defendant's adjuster must be assumed to have been sent into the state with knowledge thereof. This ruling, however, merely involved the question as to the kind of agent upon whom service could be made if the corporation was within the jurisdiction, that is, if it was doing business within the state; and this Court found such to be the case, saying:

> "Was the defendant doing business in the State of Missouri? The record discloses, and the court has found, that it had other insurance policies outstanding in the State of Missouri. Upon these policies undoubtedly premiums were paid, and it was the right of the company to investigate losses thereunder, to have an examination of the body of the deceased in proper cases, and to do whatever might be necessary to an adjustment or payment of any loss. The record shows that the company sent Dr. Mason to Fayette to investigate the loss sued for in this case, and later, and at the time of the service of the process, Mason was in Missouri with full authority to settle the loss in controversy.
>
> "Previous cases in this court have not defined the extent of the business necessary to the presence of a foreign corporation in the State for the purpose of a valid service; it is sufficient if it is doing business therein. We are of opinion that the finding

> of the court in this case is supported by testimony, and that the corporation was doing business in Missouri'' (pp. 255-256).

It is clear, therefore, that the ruling was not predicated on the single circumstance that the agent had come within the state to adjust a claim.

In their brief below, respondents stated that in *St. Louis S. W. Ry.* v. *Alexander,* 227 U. S. 218, this Court held ''that where a process service statute permitted it, a single transaction was sufficient business in the state to make the foreign corporation amenable to service of process in that state.'' The quotations from the opinion in that case, *supra,* page 24, refute the statement. That was an action against a foreign railroad corporation in the United States District Court for the Southern District of New York involving a controversy which an authorized agent resident in New York had attempted to adjust with the plaintiff. Service of process was made on a resident director in New York. The ruling that the corporation was doing business in New York did not rest alone upon the attempt to adjust the controversy, but upon facts which were thus summarized:

> ''The testimony discloses that the two roads together constitute a continuous line from St. Louis, through the States of Illinois, Missouri, Tennessee, Arkansas and Louisiana into Texas, and are together known as the 'Cotton Belt Route.' This combination has an office in the city of New York, upon the door of which, as upon the stationery and literature of the companies, the symbol, 'Cotton Belt Route,' is found in use. Underneath appears the general description, 'St. Louis Southwestern Lines,' and there is also named a general eastern freight

agent and traveling freight agent of the lines. With this joint freight agent at the office in New York the matter of the plaintiff's claim was taken up and considered, and correspondence concerning it was had through his office, and a settlement of the claim attempted. It was only after such negotiations for a settlement had failed that this action was brought. Here, then, was an authorized agent attending to this and presumably other matters of a kindred character, undertaking to act for and represent the company, negotiating for it and in its behalf declining to adjust the claim made against it. In this situation we think this was the transaction of business in behalf of the company by its authorized agent in such manner as to bring it within the District of New York, in which it was sued, and to make it subject to the service of process there."

Connecticut Mutual Life Insurance Co. v. *Spratley*, 172 U. S. 602 and *Lumbermen's Insurance Co.* v. *Meyer*, 197 U. S. 407, in their facts and conclusions are similar to *Commercial Mutual Accident Co.* v. *Davis, supra.* In each, it was held that an insurance company was doing business within the state, not because of an isolated attempt by an agent to adjust a claim there, but because of other facts which the Court considered sufficient to warrant the conclusion that the foreign corporation was within the state in manner and extent sufficient to bring it within the established rule.

It is to be noted, moreover, that the adjustment of losses is an essential part of the normal business of insurance companies, and that agents who are in a state attempting to adjust such claims are engaged there in the ordinary and usual business of their corporations. The business of

Appellant, Consolidated Textile Corporation, which is readily inferable from its name, is quite otherwise; and negotiations for the adjustment and settlement of a particular claim against it are wholly incidental to its business of dealing in textiles.

The following cases hold that the attempted compromise of claims by foreign corporations does not constitute the transaction of business of such character and extent as to subject them to the jurisdiction of the courts of the state where the attempt is made. In many of them, the subject matter of the attempted suit was that involved in the settlement negotiations.

Good Hope Co. v. *Railway Barb Fencing Co.*, 22 Fed. 635;

St. Louis Wire-Mill Co. v. *Consolidated Barb Wire Co.*, 32 Fed. 802;

Louden Machinery Co. v. *American Malleable Iron Co.*, 127 Fed. 1008;

Wilkins v. *Queens City Savings Bank & Trust Co.*, 154 Fed. 173;

Buffalo Sandstone Brick Co. v. *American Sandstone Brick Machinery Co.*, 141 Fed. 211;

Ladd Metals Co. v. *American Mining Co.*, 152 Fed. 1008;

Craig v. *Welsh Motor Car Co.*, 165 Fed. 554;

Hoyt v. *Ogden Portland Cement Co.*, 185 Fed. 889;

Noel Construction Co. v. *George W. Smith & Co.*, 193 Fed. 492;

Henry M. Day & Co., Inc., v. *Schiff Lang & Co.*, 278 Fed. 533;

Painter v. *Colorado Springs & Cripple Creek Dist. Ry. Co.*, 127 Mo. App. 248, 104 S. W. 1139.

In the *Louden Machinery Co.* case, *supra*, Judge Smith McPherson of the Southern District of Iowa said:

> "Carrying on of business by a corporation in another state means something more than a single transaction, and certainly something more than the one transaction of an attempt to compromise a matter connected with a contract of the state where the foreign corporation resides and has its being.
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> * * * * * *
>
> "As yet, I cannot believe that a foreign corporation, having a difference with an Iowa citizen concerning a contract not made in this state, surrenders itself to Iowa courts because an agent, with or without authority, comes to this state, seeking to adjust such difference. If such be the law, then compromises, so much favored by law, are largely at an end as to foreign corporations." (127 Fed., p. 1009.)

The following cases are relied upon by Appellee in its brief on motion to dismiss or affirm as being *contra*. In some of them it clearly appears that the court was of opinion that the foreign corporation had transacted business within the jurisdiction in addition to the attempted adjustment of a claim. Those that may be *contra*, however, are, it is submitted, unsound and fail to follow the established doctrine on the subject.

Meade Fibre Co. v. *Varn*, 3 Fed. (2d) 520;

Premo Specialty Mfg. Co. v. *Jersey Creme Co.*, 200 Fed. 352;

Dungan Hood & Co. v. *Bally*, 271 Fed. 517;

Brush Creek C. & M. Co. v. *Morgan-Gardner El. Co.*, 136 Fed. 505;

New Haven P. & B. Co. v. *Downington M. Co.*, 130 Fed. 605;

Houston v. *Filer & S. Co.*, 85 Fed. 757;

A. Harvey's Sons Mfg. Co. v. *Sterling M. Co.*, 247 Mich. 317, 225 N. W. 538;

St. Mary's Oil Engine Co. v. *Jackson Ice & Fuel Co.*, 222 Ala. 152, 138 So. 834;

Abbeville Electric L. & P. Co. v. *Western El. S. Co.*, 61 S. C. 361, 39 S. E. 559.

It is to be observed, moreover, that the claim in suit in the Wisconsin court did not arise out of any business transacted by Appellant within the State of Wisconsin. The record establishes that no business was ever transacted by Appellant in the State of Wisconsin except by Mr. Rupprecht on the occasion of his call upon Mr. Gold. Appellant is a Delaware corporation having its principal office in the State of New York and the record affirmatively establishes that the bonds which were sued on in Wisconsin were payable, principal and interest, in the State of New York (R. 10). Appellant alleged in its petition for writ of prohibition that no part of the transaction in which the bonds were issued took place in Wisconsin (R. 7). This allegation was not denied and there is no evidence in the record to the contrary.

Appellant not having voluntarily subjected itself to the jurisdiction of the court in Wisconsin, such jurisdiction could in any event be exercised only in respect of actions arising out of business transacted within the state.

Louisville & N. R. Co. v. *Chatters*, 279 U. S. 320, 325;

Mitchell Furn. Co. v. *Selden Breck Co.*, 257 U. S. 213;

Penna. Fire Ins. Co. v. *Gold Issue Mining Co.*, 243 U. S. 93;

Simon v. *Southern Ry. Co.*, 236 U. S. 115;

Old Wayne Mutl. Life Assn. v. *McDonough*, 204 U. S. 8;

Smolick v. *Phila. & Reading Coal Co.*, 222 Fed. 148;

Bagdon v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432.

The Appellee, in its brief on motion to dismiss or affirm (p. 8), cites *Eastman Kodak Co.* v. *Southern P. M. Co.*, 273 U. S. 359, as lending some support to its contention that a single transaction by a foreign corporation may, under a liberal process statute, constitute a sufficient transaction of business to subject it to the jurisdiction of the court. Appellee, however, can derive no aid from that case. That was a suit brought in the United States District Court in Georgia against the Eastman Kodak Company, a New York corporation, under the Sherman Anti-Trust Act. The venue was based upon the provision of Section 12 of the Clayton Act that suit might be brought against a corporation "not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; * * *." Jurisdiction of the Court having been challenged, the question for decision was whether the corporation was transacting business in Georgia. It was found that the corporation had

> "for many years prior to the institution of the suit, in a continuous course of business, carried on inter-

> state trade with a large number of photographic dealers in Atlanta and other places in Georgia, to whom it sold and shipped photographic materials from New York. A large part of this business was obtained through its travelling salesmen who visited Georgia several times in each year and solicited orders from these dealers which were transmitted to its New York offices for acceptance or rejection. In furtherance of its business and to increase the demand for its goods, it also employed travelling 'demonstrators,' who visited Georgia several times in each year, for the purpose of exhibiting and explaining the superiority of its goods to photographers and other users of photographic materials. And, although these demonstrators did not solicit orders for the defendant's goods, they took at times retail orders for them from such users, which they turned over to the local dealers supplied by the defendant" (pp. 370-371).

It is true that this Court held that under these facts the suit could not have been maintained in Georgia under the earlier statute which required that suit be brought "in the district in which the defendant resides or is found." In that connection the Court pointed out that, as applied to a corporation sued in a district where it did not reside, it was necessary under the former statute that the corporation " 'be present in the district by its officers and agents carrying on the business of the corporation' this being the only way in which it could be said to be 'found' within the district; that to make it amenable to service of process in the district, the business must be of such nature and character as to warrant the inference that it had subjected itself to the local jurisdiction, *and* was by its duly authorized officers or agents present therein; * * *" (273 U. S.,

p. 371). In other words, the term "found" included two concepts (a) that the corporation was doing business within the district of such nature and character as to warrant the inference that it had subjected itself to the jurisdiction, and (b) that it was there represented by agents engaged in that business. The later statute expressly provided that the transacting of business alone within the district was sufficient to establish the venue of a suit and the presence in the jurisdiction of agents engaged in that business was, therefore, not essential. Service of process under Section 12 of the Clayton Act might be made, and in the *Eastman* case was made, on the corporation in the district of which it was an inhabitant—that is, in the State of New York. It was still necessary, however, in order to sustain jurisdiction, to find that the corporation was carrying on business of a substantial character within the district in which the suit was brought. In defining the nature and extent of business necessary to constitute the transaction of business under the statute, this Court said:

> "* * * that a corporation is engaged in transacting business in a district, within the meaning of this section, in such sense as to establish the venue of a suit—although not present by agents carrying on business of such character and in such manner that it is 'found' therein and is amenable to local process, —*if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character*" (p. 373).

And again referring to the character and extent of the business which, it was held, constituted the transaction of business by the Eastman Company within the district, this Court said:

> "And, since it appears from the facts already stated that the defendant, *in a continuous course of business,* was engaged, not only in selling and shipping its goods to dealers within the Georgia district, but also in soliciting orders therein through its salesmen and promoting the demand for its product through its demonstrators for the purpose of increasing its sales, we conclude that it was transacting business in that district, within the meaning of §12 of the Clayton Act, in such sense as properly established the venue of the suit; * * *" (p. 374).

In other words, the essential element of jurisdiction that the corporation be engaged in the transaction of business in the district remained substantially unchanged; and tested by the general rule theretofore applied, it was found that the corporation was actually engaged in the transaction of a continuous course of business of substantial character and extent.

The significance of the decision as applied to the case at bar lies in the fact that although it was obviously the intention of Congress to enlarge the jurisdiction of the District Court to permit a suit under the Anti-Trust Act in a district where a corporation was merely "transacting business," that term was carefully defined by this Court as contemplating the transaction of business of the character and extent which under previous decisions of this Court was required in order to show that the corporation had become subject to the jurisdiction of the court. Process issued by the District Court of Georgia was held to have been validly served on the Eastman Company *in New York,* Congress having authority under the Constitution to so provide (273 U. S., p. 374). The jurisdiction of state courts on the other hand is confined to their territorial limits; and

both elements of jurisdiction must concur. That is, in the case of a foreign corporation it must be (a) actually engaged in the transaction of business within the State of such nature and extent as to subject it to the jurisdiction (b) through agents within the State upon whom process can be served.

The Eastman case thus serves to indicate the error in the decision in the case at bar. The Supreme Court of Wisconsin overlooked the two-fold test of jurisdiction and held that because the president of the corporation was in the state transacting a single item of business for the corporation, the corporation had thereby become subject to the jurisdiction of the state court, whereas, only one of the two requirements had been met. There was an officer of the corporation within the state engaged in corporate business on whom service of process might be made if, but only if, the corporation was engaged in business within the state of such character and extent as to subject it to the jurisdiction of the court.

A somewhat parallel situation would have been presented in the Eastman case if the Eastman Company had never transacted business in Georgia, but plaintiff had purchased a moving picture camera in New York with a guarantee by the Eastman Company and after a controversy had arisen and suit brought in New York on the guarantee, the president of the Eastman Company had gone to Georgia to compromise and settle the claim. Certainly it would not be suggested that the Eastman Company under such circumstances was transacting business in Georgia of such character and extent as to subject itself to suit there under the Anti-Trust Act. And if Appellant corporation had duly authorized an attorney in Milwaukee to adjust and com-

promise the claims which it was erroneously assumed by the court below Mr. Rupprecht was there to compromise and settle, would it be contended for a moment that Appellant was engaged in the transaction of business in Wisconsin so that service of process in an action involving the subject matter of the claim could, consistently with due process, be served on the Secretary of State?

When the transaction is considered apart from the president who was engaged in it, the want of merit in the contention that such business subjected Appellant to the jurisdiction of the Wisconsin Court is at once apparent. Manifestly in testing the extent and character of the business transacted by the corporation, it is immaterial whether the business is transacted by the president of the corporation or by some other authorized agent.

The court below, however, considered that while an inquiry as to the nature and extent of business transacted by Appellant within the state would have been necessary if service of process had been made upon the Secretary of State, such inquiry was not necessary in this case because service had been made upon Appellant's president while he was in the state engaged in a single transaction of business for Appellant. The court said (R. 40):

> "Under one mode of service, for the purpose of discovering the presence of the corporation, the inquiry involves the extent of business done, under the other we are concerned only with the question as to whether the corporation has so acted as to manifest its presence in the person of its officers to the extent that we may say, it was here at the time and subject to service of process. As was said, although with relation to a different state of facts, in opinion by Mr. Justice Cordoza in Tauza *v.* Susquehanna

> Coal Co., 220 N. Y. 259, 267: 'Activities insufficient to make out the transaction of business, with the meaning of those statutes, may yet be sufficient to bring the corporation within the state so as to render it amenable to process.' "

Neither the *Tauza* case nor anything that was said therein by Mr. Justice Cardozo supports the court below. There, the Appellate Division had certified to the Court of Appeals the question whether the defendant, a foreign corporation, at the time of service of summons was doing business in the State of New York within the meaning of the New York statute governing the service of summons on foreign corporations. Service had been made on an agent regularly transacting business in New York in defendant's name and behalf. The defendant contended that as it was engaged in interstate commerce only, it was not amenable to suit in New York, and relied upon decisions that foreign corporations engaged in interstate commerce were not doing business in the state within the meaning of a state statue prohibiting the transaction of business by unlicensed foreign corporations. A full quotation from the opinion serves to show that the language could have no possible application to the point in connection with which it was cited and the complete disagreement between the New York court and the Wisconsin court as to the nature and extent of the business required to be transacted by a foreign corporation within the state in order to subject itself to the jurisdiction of the local courts:

> "The defendant refers to cases in which corporations, whose situation was not unlike the defendant's have been held not to be doing business in this state within the meaning of section 15 of the Gen-

eral Corporation Law and kindred statutes.* But activities insufficient to make out the transaction of business, within the meaning of those statutes, may yet be sufficient to bring the corporation within the state so as to render it amenable to process.* In construing statutes which license foreign corporations to do business within our borders we are to avoid unlawful interference by the state with interstate commerce. The question in such cases is not merely whether the corporation is here, but whether its activities are so related to interstate commerce that it may, by a denial of a license, be prevented from being here.* 'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'* But the problem which now faces us is a different one. *It is not a problem of statutory construction. It is one of jurisdiction,* of private international law (Dicey Conflict of Laws, pp. 38, 155). We are to say, not whether the business is such that the corporation may be prevented from being here, but whether its business is such that it *is* here. *If in fact it is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity,* then, whether its business is interstate or local, it is within the jurisdiction of our courts (*International Harvester Co.* v. *Kentucky, supra,* at p. 587)" (pp. 266-7).

Appellee contends, in its brief on motion to dismiss or affirm, that Appellant had transacted business in Wisconsin through a subsidiary, Consolidated Selling Co., Inc. As heretofore seen (*supra,* pp. 13, 14), there is no basis in fact for the contention. Much less is there evidence to warrant any inference that Appellant was using its subsidiary

* Cases cited are omitted.

as a mere instrumentality for the conduct of its own business.

Numerous recent decisions of this Court establish beyond controversy that the transaction of business in Wisconsin by Appellant's subsidiary does not subject Appellant to the jurisdiction of the courts of that state.

Cannon Mfg. Co. v. *Cudahy*, 267 U. S. 333;
Louisville & N. R. Co. v. *Chatters*, 279 U. S. 320, 326;
People's Tobacco Co. v. *Am. Tobacco Co.*, 246 U. S. 79, 87;
Phila. & Reading Ry. Co. v. *McKibbin*, 243 U. S. 264, 268;
Peterson v. *Chicago, Rock Island & Pac. Ry.*, 205 U. S. 364, 391-392;
Conley v. *Mathieson Alkali Works*, 190 U. S. 406, 409;
Pullman Car Co. v. *Missouri Pac. Co.*, 115 U. S. 587, 597.

In *Cannon Mfg. Co.* v. *Cudahy Co.*, 267 U. S. 333, the plaintiff in an action brought in North Carolina sought to sustain the jurisdiction of the court over a Maine corporation by showing that a subsidiary corporation transacted business within the jurisdiction and that there was an identity *pro hac vice* between the Maine corporation defendant and its subsidiary. Judgment of the lower court dismissing the action for want of jurisdiction was sustained by this Court. The following quotation from the opinion completely disposes of the contention of the Appellee in the case at bar:

"The defendant wanted to have business transactions with persons resident in North Carolina, but for reasons satisfactory to itself did not choose to enter the State in its corporate capacity. It might have conducted such business through an independent agency without subjecting itself to the jurisdiction. *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171. It preferred to employ a subsidiary corporation. Congress has not provided that a corporation of one State shall be amenable to suit in the federal court for another State in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein. Compare *Lumiere* v. *Mae Edna Wilder, Inc.*, 261 U. S. 174, 177-8. That such use of a subsidiary does not necessarily subject the parent corporation to the jurisdiction was settled by *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406, 409-11; *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364; and *People's Tobacco Co., Ltd.* v. *American Tobacco Co.*, 246 U. S. 79, 87. In the case at bar, the identity of interest may have been more complete and the exercise of control over the subsidiary more intimate than in the three cases cited, but that fact has, in the absence of an applicable statute, no legal significance. The corporate separation, though perhaps merely formal, was real. It was not pure fiction" (pp. 336-337).

Conclusion.

It is submitted that Appellant Corporation had not by the transaction of business within the State of Wisconsin subjected itself to the jurisdiction of the courts of that state; that the attempted exercise of jurisdiction over Appellant by the state court under the circumstances

shown on this record constituted a denial of due process; that Section 262.09 (13) of the Wisconsin Statutes, which was held by the court below to authorize the exertion of such jurisdiction, is void for repugnancy to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States; and that the judgment of the court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 587

CONSOLIDATED TEXTILE CORPORATION,
Appellant,

vs.

JOHN J. GREGORY, Judge of the Circuit Court of Milwaukee County.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

APPELLANT'S BRIEF IN REPLY.

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Supreme Court of the United States

CONSOLIDATED TEXTILE CORPORATION, Appellant, *against* JOHN J. GREGORY, Judge of the Circuit Court of Milwaukee County, Respondent.	No. 587. OCTOBER TERM, 1932.

APPELLANT'S BRIEF IN REPLY.

As we have suspected would be the case, respondent's brief seeks to perpetuate in this Court the confusion regarding the facts which was created by his counsel in the minds of the court below. The greater part of the argument is based upon alleged facts which counsel must know to be unfounded; and, in view of the manner of their introduction to the record, the conclusion is almost irresistible that they were inserted by design in an effort to bring the controversy directly within the ruling of the Supreme Court of Wisconsin in Fond du Lac C. & B. Co. *v.* Henningsen, 141 Wisc. 70. Unfortunately, the effort was successful in the court below, for which reason, at the risk of some repetition, we have concluded to seek to guard against a similar result here.

At page 2 of their brief, respondent's counsel observe that "the facts . . . are *practically undisputed*";* and it is

* Unless otherwise stated, all italics in this brief are ours.

related that "as stated in Mr. Rupprecht's affidavit (R. 13, 14) * * * *Katherine Gold and six* other Wisconsin bondholders of appellant corporation transferred their interest coupons amounting to $368 which matured December 1, 1930 on appellant's bonds, to one Edythe H. Stegman of New York, who commenced an action in New York on such coupons. *These seven Wisconsin bondholders retained the bonds and subsequent interest coupons.* When a motion for summary judgment was granted in favor of Stegman in the New York action, Mr. Rupprecht *was sent by his corporation* to Wisconsin to see Mr. Gold, the attorney for *the seven* Wisconsin bondholders, *for the purpose of somehow disposing of the claims of the Wisconsin bondholders against the corporation*—Mr. Rupprecht claiming in his affidavit (R. 15) *he was sent* to persuade the Wisconsin bondholders to withhold entry of the judgment in the New York action and to deposit their bonds *with the corporation's committee.*"

Although none of the quoted statements, except those to the effect that the New York action was based upon interest coupons aggregating $368 and that Mr. Rupprecht sought to persuade Mr. Gold to influence the owners of the bonds represented by him to deposit them with a bondholders' committee, has the slightest support in the Record, the recital of facts preceding the opinion of the Supreme Court of Wisconsin and the opinion itself (R. 38, *et seq.*) disclose that the court below accepted such non-existent facts as controlling its conclusion.

It is, therefore, interesting to note that, except in Respondent's return (R. 34, sub. 8), this Court will find nothing in the Record indicating any information or knowledge on Mr. Rupprecht's part regarding the ownership of the

bonds and coupons which are the subject matter of the seven Wisconsin suits until after the service of the summonses and complaints therein (R. 15, 16, 19, 20); or indicating that the Stegman suit in New York is based upon coupons transferred by the *seven* plaintiffs in those suits; that Mr. Rupprecht "*was sent*" to Wisconsin by anyone, or that his visit was "for the purpose of somehow disposing of the claims of the Wisconsin bondholders"; nor does his affidavit make any reference to the deposit of bonds "with the *corporation's* committee." Mr. Rupprecht's affidavit identifies the *five* parties interested in the New York suit (R. 13, sub. 6); shows that as president of the appellant corporation, he visited Wisconsin of his own volition (R. 13 and 14, sub. 1, 2, 3, 4, 5, 6); and makes no reference to the bondholders' committee in any manner justifying its being characterized as "the *corporation's* committee."

Respondent's counsel seek to give effect as "findings" to the statements in the return to the alternative writ (Brief 4), among which is that "upon full and fair consideration of the affidavits of both the plaintiff and the defendant . . . I found that . . . Frederick K. Rupprecht was sent by said defendant corporation to Wisconsin to attempt to settle the *seven* individual claims of Wisconsin bondholders"; and the non-existent fact that such was the purpose of the visit is made the pivotal point of Respondent's argument that the Wisconsin service was justified, notwithstanding that Mr. Rupprecht's affidavit states clearly and definitely that his visit had another purpose (R. 13 and 14, sub. 4, 5, 6); and that neither his nor the affidavit of Mr. Gold indicates that it was concerned in any manner with the seven suits or that he was aware of the

claims involved therein until after the summonses had been served.

Is it an unreasonable assumption that Judge Gregory's return was prepared by the attorneys for Katharine Gold? At all events, it was adopted by her "and will be relied upon as a sufficient cause why said alternative writ of prohibition should not be made absolute herein" (R. 36). Accordingly, we have a situation where non-existent facts are relied upon both by the Supreme Court of Wisconsin and by Respondent as determining the merits of the controversy.

Point II of Respondent's brief is that a single transaction in Wisconsin is sufficient to bring the foreign corporation there for jurisdictional purposes, and the decision of the Wisconsin Supreme Court in Fond du Lac C. & B. Co. *v.* Henningsen, *supra*, where the controlling fact was that defendant's officer had come to Wisconsin for the purpose of seeking to adjust the controversy which was the subject matter of this suit, is stated to be decisive; and the argument of the point concludes with the assertion (Brief, 18) that "this court must accept the construction of the Wisconsin process service statute as though the statute specifically authorized service on Mr. Rupprecht when he came to Wisconsin *in relation to the matter sued on . . .*".

Point III of the brief is that appellant became amenable "By sending its President to Wisconsin to settle a number of claims against it or *to accomplish a result in connection with the matter sued on.*"

Point IV is that the Due Process clause is not violated by service "on an authorized officer of a corporation *who comes into the State to settle or deal with the matter sued on.*"

As only points II, III and IV deal with the proposition that, as decided in the Fond du Lac case, the Wisconsin courts have jurisdiction over a foreign corporation when an agent thereof visits Wisconsin in an effort to adjust the controversy which is the subject matter of the suit, Respondent's entire argument upon that subject rests upon asserted facts which counsel must be aware are wholly without support in the record.

Although we wish to be certain that the significance of the circumstance does not escape the Court's attention, we have no desire to further comment thereon.

As bearing upon the intent of Respondent's counsel, we might also point out that the brief (p. 2) also relates as "practically undisputed" facts that Katherine Gold "commenced an action" against Appellant in the Circuit Court of Milwaukee County to recover "*$2500* and interest *due* her from appellant on negotiable bonds *sold to her by appellant* (R. 9-12)." A copy of the complaint in that action appears on pages 9-12 of the record. If we are to take its statements to be correct, we find therefrom that plaintiff's $2,500 face amount of bonds are payable *twenty years* after June 1, 1921 (R. 10) and that she "is the owner and holder of said bonds *in due course* for value" (R. 11). Thus, according to the plaintiff's own statement of her case, the bonds which she owns are not by their terms due and she did not acquire them from the Appellant here.

Notwithstanding that the complaint, which is unverified, was the only part of the record before the Circuit Judge dealing with the ownership of any of the bonds involved in the seven actions, he stated in his verified return to the writ (R. 34, sub. 8) that the claims of said seven bondholders * * * were based on bonds issued by "Appel-

lant * * * and sold to said bondholders for value," and that Appellant "had defaulted in the payment of interest and *principal.*" Although *the statement purports to have been founded upon* Mr. Rupprecht's affidavit, that instrument will be searched in vain for any averment bearing the slightest resemblance thereto.

The most noteworthy circumstance regarding the legal discussion under the three points mentioned is that it completely ignores the question involved as frequently stated by this Court and presented in the two points of our main brief. Respondent's argument is to the effect that, within the doctrine of the Fond du Lac case, a single transaction by a foreign corporation may constitute the transaction of business in Wisconsin sufficiently to give its courts jurisdiction to pronounce a personal judgment if it concerns the subject matter of the action instituted there; and that the Supreme Court of Wisconsin has held that jurisdiction so acquired and exercised is due process of law. Because it is beside the fundamentals of the case, the correctness of the argument may be conceded without affecting the merits of our contention.

Respondent's brief (p. 12) contends that the facts asserted in Judge Gregory's return cannot be challenged here because their incorrectness is not assigned as error; also that appellant's Third and Fourth assignments of error "admit Mr. Rupprecht came to Wisconsin to 'compromise' the New York action."

The first contention is sufficiently met by bearing in mind that errors of the Supreme Court of Wisconsin, not those of Judge Gregory, are presented for consideration on this appeal; and the second may be admitted for the purposes of our argument. A mission to compromise a suit

upon five coupons payable December 1, 1930, aggregating $328 and appertaining to $9,200 principal amount of bonds is hardly the same as one to settle unasserted claims of seven holders upon bonds aggregating more than $15,000 in principal amount and the coupons attached thereto payable July 1, 1931 (R. 13, sub. 6; 34 subs. 8 and 10).

We might add, however, that assignments of error are quite the antithesis of statements of fact; and, so far as the author of this brief can ascertain, no fact in the record indicates that the purpose of Mr. Rupprecht's visit was to compromise the New York suit; nor did the Supreme Court of Wisconsin so find (R. 38 *et seq.*). Such being the case, we are unable to perceive the pertinency of an assignment of error indicating the contrary.

If we have convinced this Court that the sole purpose of Mr. Rupprecht's visit was to prevent entry of judgment in the New York suit, it is somewhat reassuring to find in Judge Gregory's return (R. 34, sub. 10) the statement that the action "was not brought on behalf of Katherine Gold, plaintiff in this action, or the other bondholders aforementioned, but was solely in the name of said Edythe H. Stegman to recover $368 on bearer interest coupons for interest due on bonds issued by Consolidated Textile Corporation . . . and that said action of Edythe H. Stegman *had nothing to do with this action, or the actions of the other six bondholders aforementioned.*" It would seem, therefore, that, to the extent that Respondent's position relies upon the asserted circumstance that Mr. Rupprecht was in Wisconsin to settle or compromise the New York suit, it must forfeit the protection of the Fond du Lac case, which sustained the jurisdiction of the Wisconsin court only because

the agent of the foreign corporation was present there at the time of service in an effort to compromise the claim upon which suit was brought.

Respondent pursues his effort to persuade this Court to base its conclusions upon non-existent facts by arguing (Brief, Point I) that by demurring to the return appellant has admitted the facts therein stated.

Section 293.09 (p. 2130, Official Printed Edition of the Statutes of the State of Wisconsin) provides that, in a prohibition proceeding respondent must make return to the writ "in the same manner as a writ of mandamus"; and Section 293.10 provides that the relator in a mandamus proceeding may take issue upon or demur to the matters relied upon in the return.

The practice in Wisconsin is to treat the relation and the alternative writ as a complaint and the return as an answer.

> *State ex rel. Town of Spring Lake* v. *Pierce County*, 71 Wisc. 321, 325; 37 N. W. 231;
> *State ex rel. Cothren* v. *Lean*, 9 Wisc. 279, 289-90.

In the case last cited the Court said (p. 290):

> "But we do not think this view correct. On the contrary, we are satisfied, both from the reason of the thing and from the authorities on the subject, that the affidavit, or petition on which the alternative writ issues, the allegations of which are incorporated into the writ itself, performs the office of a declaration. It sets forth the grounds relied on by the prosecutor, as entitling him to the peremptory writ, and it is incumbent on the respondent, by his return, to sufficiently answer those allegations, and negative

> the prosecutor's right. The function of the return is not simply to show what would amount to a *prima facie* right in the respondent, in the absence of any allegation to the contrary; but it is to show a right to refuse obedience to the writ, in view of the allegations it contains. And if it does not do this it is demurrable. And the very object of a demurrer to the return, *is to test its sufficiency as an answer to the allegations of the writ;* and it is obvious that this can only be done *by assuming all the material allegations of the writ not denied, nor confessed and avoided, to be true.*"

Applying this rule, we find that Judge Gregory's return states that Exhibit "C" of the return is a correct copy of Mr. Rupprecht's affidavit upon the motion to vacate the service (R. 33, sub. 2) and that the facts alleged in the return, upon which respondent mainly relies (R. 34, sub. 8), are stated to have been derived from that affidavit. Thus, not only are the allegations of the relation, and the alternative writ based thereon, not denied by the return, but they are stated to be the basis of the return itself so far as it touches upon those facts.

It is the rule in Wisconsin as elsewhere that a demurrer admits only facts well pleaded.

> *Stedman* v. *City of Berlin*, 97 Wisc. 505, 514; 73 N. W. 57;
>
> *State ex rel. Koch* v. *Melms*, 160 Wisc. 274, 278; 151 N. W. 783.

Accordingly, erroneous conclusions from facts are not admitted.

> *Northwestern M. L. Ins. Co.* v. *State*, 173 Wisc. 119, 125; 180 N. W. 138.

The situation here is analogous to that which would be presented by a demurrer to an answer in a suit wherein it was alleged that an exhibit attached to and made a part of the complaint contained statements which reference to the complaint disclosed were not contained therein. Will it be contended that, under such conditions, the statements in the answer must be accepted as true?

That, despite a demurrer, this Court will not close its eyes to the actual facts in a record is stated clearly in *Truax* v. *Corrigan*, 257 U. S. 312, 324-25, cited at pages 14 and 15 of our main brief.

Points V and VI of respondent's brief are, we trust, sufficiently covered in the brief previously filed by appellant herein.

Respectfully submitted,

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 587

CONSOLIDATED TEXTILE CORPORATION
APPELLANT,

vs.

JOHN J. GREGORY, JUDGE OF THE CIRCUIT COURT OF MILWAUKEE COUNTY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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INDEX.

Subject Index.

	Page
Appellee's statement against the jurisdiction of this court, and motion to dismiss or affirm	1
Nature of case and ruling below	2
Cases believed to oppose jurisdiction of this court	5
Motion to dismiss or affirm	11

Table of Cases Cited.

Abbeville Electric L. & P. Co. v. Western El. S. Co., 39 S. E. 559 (S. C., 1901)	6
A. Harvey's Sons Mfg. Co. v. Sterling M. Co., 225 N. W. 538 (Mich., 1929)	6
Barrow S. S. Co. v. Kane, 170 U. S. 100, 18 S. Ct. 526, 30 A. L. R. 258	7, 9
Brush Creek C. & M. Co. v. Morgan-Gardner El. Co., 136 Fed. 505 (C. C. Mo., 1905)	6
Commercial Mut. Acc. Co. v Davis, 213 U. S. 245, 29 S. Ct. 445, 447-448	4, 5, 8
Conn. Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 19 S. Ct. 308, 312	5
Denver & R. G. R. Co. v. Roller, 100 Fed. 738, 741 (C. C. A., 9th Cir., 1900)	6
Dungan Hood & Co. v. Bally, 271 Fed. 517 (D. C. Pa. 1921)	5
Eastman Kodak Co. v. Southern P. M. Co., 273 U. S. 359, 47 S. Ct. 400	8
Fond du Lac C. & B. Co. v. Henningsen Produce Co., 141 Wis. 70, 123 N. W. 640	4, 7
Green v. Chicago, etc. R. Co., 205 U. S. 530, 27 S. Ct. 595, 596	6, 8
Houston v. Filer & S. Co., 85 Fed. 757 (C. C. Ill., 1898)	6
International Harvester Co. v. Kentucky, 234 U. S. 579, 34 S. Ct. 944, 945	6, 8
Louisville & N. R. Co. v. Chatters, 279 U. S. 320, 49 S. Ct. 329	10
Meade Fibre Co. v. Yarn, 3 Fed. (2d) 520 (C. C. A. 4th Cir., 1925, certiorari denied 269 U. S. 564, 46 S. Ct. 23)	5
New England Mut. L. Ins. Co. v. Woodworth, 111 U. S. 138, 4 S. Ct. 364	9
New Haven P. & B. Co. v. Downington M. Co., 130 Fed. 305 (C. C. Conn., 1904)	6

Page

New York L. E. & W. R. Co. v. Estill, 147 U. S. 591, 13 S. Ct. 444 9
Pa. Fire Ins. Co. v. Gold Issue M. & M. Co., 243 U. S. 93, 37 S. Ct. 344 10
Premo Specialty Mfg. Co. v. Jersey Creme Co., 200 Fed. 352 (C. C. A., 9th Cir., 1912) 5
Riverside Cotton Mills v. Menefee, 237 U. S. 589, 35 S. Ct. 579, 581 7
St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 356, 361 7
St. Louis S. W. R. Co. v. Alexander, 227 U. S. 218, 33 S. Ct. 245, 247 8
St. Mary's Oil Engine Co. v. Jackson Ice & Fuel Co., 138 So. 834 (Ala., 1931) 6
State ex rel. Consolidated Textile Corporation v. Gregory, Judge, 245 N. W. 194 4

STATUTES CITED.

Wisconsin Statutes, Section 262.09, Subsection 10 4
Subsection 13 ..... 4, 7

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 587

CONSOLIDATED TEXTILE CORPORATION,
A CORPORATION, APPELLANT,

vs.

JOHN J. GREGORY, JUDGE OF THE CIRCUIT COURT OF MILWAUKEE COUNTY.

APPELLEE'S STATEMENT AGAINST THE JURISDICTION OF THIS COURT, AND MOTION TO DISMISS OR AFFIRM.

MAY IT PLEASE THE COURT:

Pursuant to Rule 12, paragraph 3, the appellee submits his statement opposing the jurisdiction of this Court to review the judgment in the above entitled cause and includes herewith a motion to dismiss this appeal, or, in the alternative, to affirm the judgment of the Supreme Court of the State of Wisconsin from which this appeal is taken. In this behalf, the appellee respectfully represents:

A.

Nature of Case and Ruling Below.

Katherine Gold, a citizen and resident of Milwaukee, Wisconsin, on January 14, 1932, commenced an action in the Circuit Court of Milwaukee County, Wisconsin, against appellant, Consolidated Textile Corporation, for the recovery of $2,500 and interest on certain negotiable bonds sold by appellant. Service was obtained upon appellant by serving the summons and complaint upon Mr. Rupprecht, president of the appellant, while he was in Milwaukee. Appellant appeared specially in the circuit court and moved to set aside the service. The motion was denied and judgment was entered in favor of Katherine Gold upon default on July 1, 1932. Thereafter appellant petitioned the Supreme Court of Wisconsin for a writ of prohibition to restrain Judge Gregory, the judge of the Circuit Court of Milwaukee County, from further proceeding in the Katherine Gold action against appellant. The Supreme Court of Wisconsin granted an alternative writ commanding Judge Gregory to show cause why he should not be restrained from further proceeding in that action and the judge made his return to the alternative writ.

Some of the claims in appellant's "Statement of Facts" (pp. 5-7 of appellant's statement as to jurisdiction)—that the Stegeman action commenced in the New York court was on behalf of the Wisconsin bondholders, that no judgment had been granted in that action, and that Mr. Rupprecht came to Milwaukee merely to discuss the New York action with Mr. Gold,

are untrue and against the undisputed facts contained in the record. In his return to the alternative writ, the circuit judge stated the facts as he found them with reference to the service of process upon appellant's president when he came to Wisconsin. The material portions of those findings are as follows:

(*a*) That Mr. Rupprecht, president of Consolidated Textile Corporation, was sent by the corporation to Wisconsin to attempt to settle the claims of Katherine Gold and six other Wisconsin bondholders, totalling over $15,000, against the corporation, with Walter L. Gold, their attorney, and at the time of the service of process upon him, he was in Wisconsin on the business of the corporation; that he was then engaged in conducting business of the corporation in Wisconsin; that he told Mr. Gold that he was then also in Wisconsin on the business of his corporation with several of its Wisconsin customers; and that the corporation had been doing business in Wisconsin through a wholly owned and controlled subsidiary corporation.

(*b*) The action of *Edythe H. Stegeman* v. *Consolidated Textile Corporation*, commenced in the New York court, was not brought on behalf of Katherine Gold or the other Wisconsin bondholders, had nothing to do with the Katherine Gold action, and a motion for summary judgment had been granted in favor of Stegeman in that action.

(*c*) Appellant's claim that its president was enticed into the State of Wisconsin is untrue and that claim was withdrawn by appellant in open court.

Appellant demurred to that return, thereby admitting the facts therein stated.

Wis. Stats., Section 262.09(13), quoted on page 4 of appellant's statement as to jurisdiction, provides that service may be made upon a foreign corporation by serving the summons and complaint upon

> "any such officer being within the state, or to any agent having charge of or conducting any business therefor in this state"

when the action is in favor of a resident of Wisconsin. The words "*such officer*" refer to the officers enumerated in *Wis Stats.*, Section 262.09(10) which enumerates the president, vice-president, secretary, treasurer, etc., as the officers to whom copies of process may be delivered.

Upon the admitted facts, the Supreme Court of Wisconsin held (*State, ex rel. Consolidated Textile Corporation* v. *Gregory, Judge,* — Wis. —, 245 N. W. 194) that by sending its president to Wisconsin to attempt to settle a number of claims of Wisconsin residents against it, appellant was present and conducting business in the State through the presence of its president and became amenable to service of process in Wisconsin under *Wis. Stats.*, Section 262.09(13). In so holding, the court followed a like ruling upon like facts in an earlier Wisconsin case decided in the year 1909, *Fond du Lac C. & B. Co.* v. *Henningsen Produce Co.*, 141 Wis. 70, 123 N. W. 640, and in its opinion the court also considered that its ruling was in accord with *Commercial Mut. Acc. Co.* v. *Davis*, 213 U. S. 245, 29

S. Ct. 445; *Premo Specialty Mfg. Co.* v. *Jersey Creme Co.*, 200 Fed. 352 (C. C. A., 9th Cir., 1912).

B.

Cases Believed to Oppose Jurisdiction of this Court.

This appeal does not present any substantial Federal question. Appellant claims it has been denied due process of law by the State court's ruling sustaining the service under the State statute which appellant claims is unconstitutional. But this court has decided a number of times that like State process service statutes were valid and not repugnant to the due process clause of the constitution and under such statutes sustained the service upon an officer or agent whom the foreign corporation sent into the State to represent it in connection with the matter sued on, even though the officer went into the State for that single transaction.

Commercial Mut. Acc. Co. v. *Davis*, 213 U. S. 245, 29 S. Ct. 445, 447-8;

Conn. Mut. Life Ins. Co. v. *Spratley*, 172 U. S. 602, 19 S. Ct. 308, 312.

Inferior Federal courts came to the same conclusion.

Meade Fibre Co. v. *Varn*, 3 Fed. (2d) 520 (C. C. A., 4th Cir., 1925, certiorari denied 269 U. S. 564, 46 S. Ct. 23);

Premo Specialty Mfg. Co. v. *Jersey Creme Co.*, 200 Fed. 352 (C. C. A., 9th Cir., 1912);

Dungan Hood & Co. v. *Bally*, 271 Fed. 517 (D. C. Pa., 1921);

Brush Creek C. & M. Co. v. *Morgan-Gardner El. Co.*, 136 Fed. 505 (C. C. Mo., 1905);
New Haven P. & B. Co. v. *Downington M. Co.*, 130 Fed. 605 (C. C. Conn., 1904);
Houston v. *Filer & S. Co.*, 85 Fed. 757 (C. C. Ill., 1898).

And so have State courts of last resort in addition to the Wisconsin court.

A. Harvey's Sons Mfg. Co. v. *Sterling M. Co.*, 225 N. W. 538 (Mich., 1929);
St. Mary's Oil Engine Co. v. *Jackson Ice & Fuel Co.*, 138 So. 834 (Ala., 1931);
Abbeville Electric L. & P. Co. v. *Western El. S. Co.*, 39 S. E. 559 (S. C., 1901).

The purpose of process service statutes of this type is to insure that the foreign corporation will receive reasonable notice of the commencement of the action through an authorized representative. *Denver & R. G. R. Co.* v. *Roller*, 100 Fed. 738, 741 (C. C. A., 9th Cir., 1900).

The due process clause of the Federal Constitution has not fixed the amount of business a foreign corporation must do in a state in order to be amenable to the process of its courts. This court has held that the states have great latitude in defining what constitutes "doing business" by foreign corporations within their borders for the purpose of making such corporations amenable to the process of their courts. *Green* v. *Chicago, etc., R. Co.*, 205 U. S. 530, 27 S. Ct. 595, 596; *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 945.

It is the character and power of the one served as the agent of the corporation which is the test of the right to acquire jurisdiction over the foreign corporation. Due process merely prohibits the States from extending their authority beyond their jurisdiction so as to condemn the resident of another State only when neither his person nor his property is within the jurisdiction of the court rendering the judgment. *Riverside Cotton Mills* v. *Menefee*, 237 U. S. 589, 35 S. Ct. 579, 581.

Since a corporation can act only through individuals, when any individual officer or agent is acting within the authority committed to him, he is performing an act of the corporation, and the corporation must then be deemed to be physically present through the individual exercising its powers within the State. *St. Clair* v. *Cox*, 106 U. S. 350, 1 S. Ct. 354, 356, 361.

"The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them." *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100, 18 S. Ct. 526, 528.

Since *Fond du Lac C. & B. Co.* v. *Henningsen Produce Co.*, 141 Wis. 70, 123 N. W. 640, Wisconsin has been committed to the doctrine that a single transaction in the State by a foreign corporation constitutes "conducting any business" within the State under *Wis. Stats., section* 262.09 (13), so as to subject the foreign corporation to service of process in the State.

The determination of the question whether a foreign corporation is doing business within a state so

as to be subject to suit therein, depends upon the facts of each particular case. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 34 S. Ct. 944, 945; *St. Louis S. W. R. Co.* v. *Alexander*, 227 U. S. 218, 33 S. Ct. 245, 247. Of course, the facts of each case include not only the acts constituting the conducting of business, but also the language of the process service statute.

The cases cited by appellant at the top of page 12 in appellant's statement as to jurisdiction, which held the service of process invalid, are inapplicable and distinguishable because those cases were not based on due process but either (1) upon construction of the jurisdiction of the Federal courts under process service statutes which required the foreign corporation "to reside" or "to be found" or to be "an inhabitant" in the district, and such statutes were construed to require more than one transaction to be done in the district to make the corporation amenable to service of process there; or (2) the officer was in the State or district only on his private affairs and hence could not be deemed to represent the corporation at all. This distinguishing feature is pointed out in *Green* v. *Chicago B. & Q. R. Co.*, 205 U. S. 530, 27 S. Ct. 595, 596 and is apparent from the rulings in *St. Louis S. W. R. Co.* v. *Alexander*, 227 U. S. 218, 33 S. Ct. 245, and *Eastman Kodak Co.* v. *Southern P. M. Co.*, 273 U. S. 359, 47 S. Ct. 400, which sustained the service under more liberal process service statutes.

The other cases cited at the top of page 12 in appellant's statement as to jurisdiction, which sustained the service, *Commercial Mut. Acc. Co.* v. *Davis*, 213 U. S. 245, 29 S. Ct. 445, and *International Harvester*

Co. v. *Kentucky*, 234 U. S. 579, 34 S. Ct. 944, are not only against appellant's contentions but are in favor of appellee.

Even though the cause of action of Katherine Gold may have arisen out of a transaction outside the State (appellant's contention, but not necessarily true and not determined), that does not contitutionally prohibit the State from asserting jurisdiction over the foreign corporation on a cause of action in favor of a resident of the State.

Barrow S. S. Co. v. *Kane*, 170 U. S. 100, 18 S. Ct. 526, 30 A. L. R. 258;

New York L. E. & W. R. Co. v. *Estill*, 147 U. S. 591, 13 S. Ct. 444;

New England Mut. L. Ins. Co. v. *Woodworth*, 111 U. S. 138, 4 S. Ct. 364.

The cases cited at the bottom of page 12 of appellant's statement as to jurisdiction, relating to a State's power to assert jurisdiction over a foreign corporation on a cause of action arising outside the State, are wholly inapplicable because those are cases where service was made not upon an actual officer or agent of the corporation, but upon some State officer who was appointed by a State statute—an imputed or constructive agent created by statute. Those decisions are based upon the limited service allowed by the statutes themselves—the statutes authorizing service upon a State officer only when the transaction arose out of business transacted in the State, or the corporation had property in the State. Even so, the United States

Supreme Court expressly held that where substituted service is thus made upon an imputed or constructive agent, the service statute may, without violating due process, apply to causes of action arising out of transactions outside the State, where the service statute expressly or by local construction authorized service in such cases.

Pa. Fire Ins. Co. v. *Gold Issue M. & M. Co.*, 243 U. S. 93, 37 S. Ct. 344;

Louisville & N. R. Co. v. *Chatters*, 279 U. S. 320, 49 S. Ct. 329.

We therefore respectfully submit that there is no substantial Federal question involved on this appeal; that the questions raised on this appeal have been decided a number of times against the appellant's contentions, and the appeal should therefore be dismissed, or the judgment of the Supreme Court of Wisconsin from which this appeal is taken be affirmed.

Attached hereto is a motion to dismiss or affirm.

Respectfully submitted,

WALTER L. GOLD,
RAY T. McCANN,
MORRIS KARON,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 587

CONSOLIDATED TEXTILE CORPORATION,
A CORPORATION, APPELLANT,

vs.

JOHN J. GREGORY, JUDGE OF THE CIRCUIT COURT OF MILWAUKEE COUNTY, APPELLEE.

MOTION TO DISMISS OR AFFIRM.

Comes now the appellee in the above entitled cause, by his counsel of record, and, pursuant to Rule 7, paragraph 4, of United States Supreme Court Rules, moves that the appeal in the above entitled cause be dismissed, or, in the alternative, the judgment of the Supreme Court of the State of Wisconsin from which the appeal is taken, be affirmed.

Dated December 20, 1932.

WALTER L. GOLD,
RAY T. McCANN,
MORRIS KARON,
Counsel for Appellee.

Service admitted this 20th day of December, 1932.

GEORGE B. HUDNALL,
LOUIS A. LECHER,
FRANK L. McNAMARA,
SUEL O. ARNOLD,
Counsel for Appellant.

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In the Supreme Court of the United States

October Term, 1932.

No. 587.

CONSOLIDATED TEXTILE CORPORATION,
Appellant,

vs.

JOHN J. GREGORY, Judge of the Circuit Court of Milwaukee County,
Respondent.

On Appeal from the Supreme Court of the State of Wisconsin.

BRIEF FOR RESPONDENT.

GOLD AND McCANN,
Attorneys for Respondent.

WALTER L. GOLD,
RAY T. McCANN,
MORRIS KARON,
Of Counsel.

SUBJECT INDEX TO BRIEF.

	Page
Table of Cases and Statutes	i
Statement of the Case	1
Summary of Argument	5
Argument	11
I. Judge Gregory's return to the alternative writ of prohibition stands admitted and cannot be impeached by appellant	11
II. A single transaction in Wisconsin constitutes conducting business within the state under the Wisconsin process service statute so as to make a foreign corporation amenable to service of process in Wisconsin	14
III. By sending its president to Wisconsin to attempt to settle a number of claims against it, or to accomplish a result in connection with the matter sued on, appellant corporation became amenable to service of process in Wisconsin	18
IV. Service under the Wisconsin statute on an authorized officer of a foreign corporation who comes into the state to settle or deal with the matter sued on does not violate due process of law	23
V. The fact that the cause of action may have arisen out of a transaction outside the state does not affect the state's jurisdiction	40

Page

VI. A foreign corporation is amenable to service of process by service on its officer within the state, where it is doing business within the state by a subsidiary corporation 44

Conclusion 46

CASES CITED.

Abbeville Electric L. &. P. Co. vs. Western El. S. Co., 61 S. C. 361, 39 S. E. 559 ..... 9, 28, 34
Allen vs. Milwaukee, 128 Wis. 678, 106 N. W. 1099 ..... 6, 17
American Food Products Co. vs. American M. Co., 151 Wis. 385, 138 N. W. 123 43
Bank of America vs. Whitney, Bank, 261 U. S. 171, 43 Sup. Ct. 34 38
Barrow S. S. Co. vs. Kane, 170 U. S. 100, 18 Sup. Ct. 526 ..... 7, 8, 23, 27
Behn Meyer & Co. vs. Campbell, 205 U. S. 403, 27 Sup. Ct. 502 ..... 5, 12
Brush Creek C. & M. Co. vs. Morgan-Gardner El. Co., 136 Fed. 505 ..... 9, 27, 32
Bristol vs. Brent, 110 Pac. 356, 358, 38 Utah 58 35
Cannon Mfg. Co. vs. Cudahy, 126 U. S. 333, 45 Sup. Ct. 250 45
Case vs. Smith & Co., 152 Fed. 730 37
Chattanooga Nat. B. & L. Assn. vs. Denson, 189 U. S. 408, 23 Sup. Ct. 630 ..... 8, 25, 26
Commercial Mut. Acc. Co. vs. Davis, 213 U. S. 245, 29 Sup. Ct. 446 ..... 9, 22, 26, 27, 28, 46
Conn. Mut. Life Ins. Co. vs. Spratle, 172 U. S. 602 19 Sup. Ct. 308 ..... 9, 27, 29, 46
Conley vs. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728 39

Page

Denver R. G. R. Co. vs. Roller, 100 Fed. 738.....8, 24, 26
Duluth Music Co. vs. Clancy, 139 Wis. 189, 120 N. W. 854 ..... 6, 17
Dungan Hood & Co. vs. Bally, 271 Fed. 517 ..... 9, 27
Eastman Kodak Co. vs. Southern P. M. Co., 273 U. S. 359, 47 Sup. Ct. 400 .....36, 45
Eingartner vs. Illinois Steel Co., 94 Wis. 70, 68 N. W. 664 43
First Wisconsin Trust Co. vs. Munday, 168 Wis. 31, 168 N. W. 393 ..... 6, 17
Fond du Lac C. & B. Co. vs. Henningsen Produce Co., 141 Wis. 70, 123 N. W. 640 ..... 6, 15
Green vs. Chicago B. & Q. R. Co., 205 U. S. 530, 27 Sup. Ct. 595 .....7, 23, 35, 39
Goldey vs. Morning News, 156 U. S. 518, 15 Sup. Ct. 559 .....37, 39
A. Harvey's Sons Mfg. Co. vs. Sterling M. Co., 225 N. W. 538 (Mich.) 9, 28
Hess vs. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632..... 9, 34
Houston vs. Filer & S. Co., 85 Fed. 757.....9, 27, 32
Hunter vs. Mutual Reserve Life Ins. Co., 218 U. S. 586, 31 Sup. Ct. 127 41
International Harvester Co. vs. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944 .....7, 8, 23, 45
James H. Dickinson E. M. Co. vs. Harry, 273 U. S. 119, 47 Sup. Ct. 308 38
Lipe vs. Carolina C. & O. R. Co., 123 S. C. 515, 116 S. E. 101 42
Louisville & N. R. Co. vs. Chatters, 279 U. S. 320, 49 Sup. Ct. 329 .....41, 42
Lowitz vs. Kimmerle, 221 Fed. 857 37
Lumiere vs. Wilder, 261 U. S. 174, 43 Sup. Ct. 312.... 38

Page

Meade Fibre Co. vs. Varn, 3 Fed. (2d) 520, (C. C. A. 4th Cir., 1925, certiorari denied 259 U. S. 564, 46 Sup. Ct. 23) 9, 27

Minneapolis Threshing Mach. Co. vs. Ashauer, 142 Wis. 646, 126 N. W. 113 ..... 6, 16

Mitchell Furn. Co. vs. Selden Co., 257 U. S. 213, 42 Sup. Ct. 84 41

New Haven P. & B. Co. vs. Downington M. Co., 130 Fed. 605 ..... 9, 27, 33

Old Wayne Mut. L. Assn. vs. McDonough, 204 U. S. 8, 27 Sup. Ct. 236 41

Paraiso vs. United States, 207 U. S. 368, 28 Sup. Ct. 127 ..... 5, 12

Paulus vs. Hart-Par. Co., 136 Wis. 601, 118 N. W. 248 45

Pennsylvania Fire Ins. Co. vs. Gold Issue M. & M. Co., 243 U. S. 93, 37 Sup. Ct. 344 ..... 7, 18, 42

People's Tobacco Co. vs. Amer. Tob. Co., 246 U. S. 79, 38 Sup. Ct. 233 46

Peterson vs. Chicago, etc., R. Co., 205 U. S. 364, 27 Sup. Ct. 513 46

Philadelphia & R. R. Co. vs. McKibbin, 243 U. S. 264, 37 Sup. Ct. 280 38

Phoenix Nursery Co. vs. Trostel, 166 Wis. 215, 164 N. W. 995 ..... 6, 17

Premo Specialty Mfg. Co. vs. Jersey Creme Co., 200 Fed. 352 ..... 9, 27, 33

Quong Ham Wah Co. vs. Industrial Commission, 255 U. S. 445, 41 Sup. Ct. 373 ..... 6, 17

Riverside Cotton Mills vs. Menefee, 237 U. S. 589, 35 Sup. Ct. 579 ..... 24, 39

Rosenberg Bros. Co. vs. Curtis Brown Co., 260 U. S. 516, 43 Sup. Ct. 170 38

St. Clair vs. Cox, 106 U. S. 350, 1 Sup. Ct. 354 27

Page

St. Mary's Oil Engine Co. vs. Jackson Ice & Fuel Co., 138 So. 834 (Ala., 1931) 9, 28
St. Louis S. W. R. Co. vs. Alexander, 227 U. S. 218, 33 Sup. Ct. 245 ..... 8, 24, 36
Southwestern Slate Co. vs. Stephens, 139 Wis. 616, 120 N. W. 408 ..... 6, 17
Sprout Waldron & Co. vs. Amery M. Co., 162 Wis. 279, 156 N. W. 158 ..... 6, 17
State ex rel P. R. Co. vs. Circuit Court, 178 Wis. 648, 190 N. W. 366 ..... 8, 24
State ex rel Rubber Co. vs. Gregory, 205 Wis. 189, 236 N. W. 524 ..... 6, 17
State ex rel Smith vs. Belden, 205 Wis. 158, 236 N. W. 542 44
Supreme Lodge vs. Meyer, 265 U. S. 30, 44 Sup. Ct. 432 ..... 7, 18
Tauza vs. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915 ..... 8, 24, 25, 26
Tetley, etc., vs. Rock Falls Mfg. Co., 176 Wis. 400, 187 N. W. 204 ..... 8, 24, 45
Vitkus vs. Clyde Co., 232 Fed. 288 37
West vs. Cincinnati R. Co., 170 Fed. 349 37
Wood vs. Wilbert's Sons S. & L. Co., 226 U. S. 384, 33 Sup. Ct. 125 ..... 5, 12

STATUTES CITED.

Judicial Code, Sec. 51 (28 U. S. C. A., Sec. 112) 36
28 U. S. C. A., Section 862 12
28 U. S. C. A., Section 861b 12
Wis. Stats., Section 226.02 16
Wis. Stats., Section 226.02 (9) 17
Wis. Stats., Section 262.09 14
Wis. Stats., Section 262.09 (10) 15

Page

Wis. Stats., Section 262.09 (13) 14, 19, 36, 42
Wis. Stats., Section 293.03 11
Wis. Stats., Section 293.08 11
Wis. Stats., Section 293.10 11
Wis. Stats., Section 293.12 11

TEXTS CITED.

30 A. L. R. 258 ..... 10, 40
Rule 27 (4) U. S. Supreme Court Rules 5

In the Supreme Court of the United States

October Term, 1932.

No. 587.

CONSOLIDATED TEXTILE CORPORATION,
Appellant,

vs.

JOHN J. GREGORY, Judge of the Circuit Court of Milwaukee County,
Respondent.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

A good deal of what is contained under appellant's "Statement of the Case" (Appellant's Brief, pp. 5-15) is entirely immaterial to the narrow question involved in this case. The reference to the recitations in the alternative writ of prohibition (R. 26-31) is immaterial because, as

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* Italics in this brief are ours, unless otherwise stated.

appears from an examination of the alternative writ, the recitals are merely a repetition of the claims in the appellant's petition for the alternative writ (R. 4-9). The recitals in the alternative writ do not add anything to the appellant's claims because those recitals were no adjudication of the correctness of the appellant's claims in the petition for the alternative writ. Reference to the fact that default judgment had been entered against appellant, which was vacated to give appellant an opportunity to plead, is immaterial. Likewise is the reference to the fact that respondent had moved to quash the alternative writ before making his return. The motion to quash was withdrawn by stipulation of appellant and respondent and the case was heard on appellant's demurrer to the return. The statement on page 8 of Appellant's Brief that the complainant, Katherine Gold, claimed in her complaint that upon default in payment of interest on a bond the bondholder "may always declare due the principal thereof," is without foundation. That is not the allegation of the complaint.

The facts in this case are practically undisputed. Katherine Gold, a citizen and resident of Milwaukee, Wisconsin, commenced an action in the Circuit Court of Milwaukee County, Wisconsin, against appellant, Consolidated Textile Corporation, on January 14, 1932, for the recovery of $2500 and interest, due her from appellant on negotiable bonds sold to her by appellant (R. 9-12). Service was made upon appellant by serving the summons and complaint upon Mr. Rupprecht, president of the appellant corporation, while he was in Milwaukee, Wisconsin, on his corporation's business (R. 15-16). Appellant appeared specially in the Circuit Court and, on Mr. Rupprecht's affidavit, moved to set aside the service (R. 12-16). The motion was heard by the Circuit Court of Milwaukee County,

Wisconsin, Honorable John J. Gregory judge presiding, on the affidavits of Mr. Rupprecht (R. 12-16), Mr. Gold (R. 17-22), and Mr. Karon (R. 23). The motion was denied and an order was entered denying the motion (R. 24). Appellant then petitioned the Supreme Court of Wisconsin for an alternative writ of prohibition to restrain Judge Gregory from further proceeding in the Katherine Gold action against appellant (R. 4-9). The Supreme Court of Wisconsin granted an alternative writ (R. 26), commanding Judge Gregory to show cause why he should not be restrained from further proceeding in that action, and Judge Gregory made his return to the alternative writ (R. 32-35), which return Katherine Gold adopted (R. 36).

It is true, as stated in Mr. Rupprecht's affidavit (R. 13-14), that Katherine Gold and six other Wisconsin bondholders of appellant corporation transferred their interest coupons amounting to $368 which matured December 1, 1930 on appellant's bonds, to one Edythe H. Stegeman of New York, who commenced an action in New York on such coupons. These seven Wisconsin bondholders retained the bonds and subsequent interest coupons. When a motion for summary judgment was granted in favor of Stegeman in the New York action, Mr. Rupprecht was sent by his corporation to Wisconsin to see Mr. Gold, the attorney for the seven Wisconsin bondholders, for the purpose of somehow disposing of the claims of the Wisconsin bondholders against the corporation—Mr. Rupprecht claiming in his affidavit (R. 15) he was sent to persuade the Wisconsin bondholders to withhold entry of the judgment in the New York action and to deposit their bonds with the corporation's committee.

In his return to the alternative writ (R. 32-35), Judge Gregory, the circuit judge, stated the ultimate facts as he found them with reference to the service of process upon

appellant's president when he came to Wisconsin. The material portions of the findings in the return are as follows:

(a) That Mr. Rupprecht, president of Consolidated Textile Corporation, was sent by the corporation to Wisconsin to attempt to settle a controversy between the corporation and seven Wisconsin bondholders, who held the corporation's bonds in the sum of over $15,000, upon which the corporation defaulted, with Mr. Gold, their attorney, and that Mr. Rupprecht insisted, against the objection of Mr. Gold, upon coming to Wisconsin, and that at the time of service of process upon him, Mr. Rupprecht was in Wisconsin on the business of the corporation; that he was then engaged in conducting business of the corporation in Wisconsin; that he told Mr. Gold that he was then also in Wisconsin on the business of his corporation with several of its Wisconsin customers; and that the appellant corporation had been doing business in Wisconsin through a wholly owned and controlled subsidiary corporation (R. 34, 35).

(b) Appellant's claim that its president was enticed into the State of Wisconsin was untrue, and that claim was withdrawn by appellant in open court upon the argument of the motion to set aside the service of process; that the affidavits of Mr. Gold and Mr. Karon were true (R. 34).

(Stipulation, R. 36)

Appellant demurred to the return and after hearing the case on the merits, the Supreme Court of Wisconsin overruled the demurrer and denied the writ (R. 37), and filed an opinion (R. 38-44).

Summary of Argument.

I.

Judge Gregory's Return to the Alternative Writ of Prohibition Stands Admitted and Cannot Be Impeached by Appellant.

By demurring to Judge Gregory's return appellant admitted the allegations thereof under the Wisconsin Procedure.

The return cannot be questioned in this court because it was not challenged in the assignment of errors.

Rule 27 (Par. 4) of United States Supreme Court rules.

Paraiso vs. United States, 207 U. S. 368, 28 Sup. Ct. 127 (syl. 4);

Wood vs. Wilbert's Sons S. & L. Co., 226 U. S. 384, 33 Sup. Ct. 125;

Behn Meyer & Co. vs. Campbell, 205 U. S. 403, 27 Sup. Ct. 502.

Judge Gregory's return is supported by the affidavits and the reasonable inferences to be drawn therefrom.

II.

A Single Transaction in Wisconsin Constitutes Conducting Business Within the States Under the Wisconsin Process Service Statute so as to Make a Foreign Corporation Amenable to Service of Process in Wisconsin.

It is the settled rule in Wisconsin that a single transaction in the state by a foreign corporation

through an authorized officer constitutes "conducting any business" in the state within the meaning of the process service statute.

Fond du Lac C. & B. Co. vs. Henningsen Produce Co., 141 Wis. 70, 123 N. W. 640;

Minneapolis Threshing Mach. Co. vs. Ashauer, 142 Wis. 646, 649, 126 N. W. 113.

It is also the settled rule in Wisconsin that a single contract or transaction within the state by an unlicensed foreign corporation comes within the prohibition of the state licensing statute.

Southwestern Slate Co. vs. Stephens, 139 Wis. 616, 120 N. W. 408;

Duluth Music Co. vs. Clancy, 139 Wis. 189, 120 N. W. 854;

Allen vs. Milwaukee, 128 Wis. 678, 106 N. W. 1099;

Sprout Waldron & Co. vs. Amery M. Co., 162 Wis. 279, 156 N. W. 158;

First Wisconsin Trust Company vs. Munday, 168 Wis. 31, 168 N. W. 393;

Phoenix Nursery Co. vs. Trostel, 166 Wis. 215, 164 N. W. 995;

State ex rel Rubber Co. vs. Gregory, 205 Wis. 189, 236 N. W. 524.

The construction placed upon the Wisconsin service statute by the Wisconsin court must be accepted by the United States Supreme Court on review as though that construction had been specifically expressed in the statute.

Quong Ham Wah Co. vs. Industrial Commission, 255 U. S. 445, 41 Sup. Ct. 373;

Supreme Lodge vs. Meyer, 265 U. S. 30, 44 Sup. Ct. 432;

Pennsylvania Fire Ins. Co. vs. Gold Issue M & M Co., 243 U. S. 93, 37 Sup. Ct. 344.

III.

By Sending Its President to Wisconsin to Attempt to Settle a Number of Claims Against It, or to Accomplish a Result in Connection With the Matter Sued on, Appellant Corporation Became Amenable to Service of Process in Wisconsin.

The ruling of the Wisconsin Supreme Court in the instant case is merely in accord with the well settled Wisconsin rule.

IV.

Service Under the Wisconsin Statute on an Authorized Officer of a Foreign Corporation Who Comes Into the State to Settle or Deal With the Matter Sued on Does Not Violate Due Process of Law.

The states have great latitude in defining what constitutes doing business by foreign corporations within their borders for the purpose of making such corporations amenable to the process of their courts.

Green vs. Chicago, etc., R. Co., 205 U. S. 530, 27 Sup. Ct. 595, 596;

International Harvester Co. vs. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 945;

Barrow S. S. Co. vs. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 528.

Whether a foreign corporation is doing business within a state so as to be subject to suit therein depends on the facts of each particular case, which facts include the language of the process service statute, as well as the acts constituting the doing of business.

International Harvester Co. vs. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 945;

St. Louis S. W. R. Co. vs. Alexander, 237 U. S. 218, 33 Sup. Ct. 245, 247;

State, ex rel P. R. Co. vs. Circuit Court, 178 Wis. 648, 656, 190 N. W. 366;

Tetley, etc., vs. Rock Falls Mfg. Co., 176 Wis. 400, 403, 187 N. W. 204.

The purpose of a process service statute of the type involved in this case is to insure the foreign corporation will receive reasonable notice of the commencement of the action through an authorized representative in the state on the business of the corporation.

Denver R. G. R. Co. vs. Roller, 100 Fed. 738, 741;

Tauza vs. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915, 918.

There is no constitutional objection to making a single transaction constitute "doing business"; the extent of the business required is for the state to determine.

Chattanooga Nat. B. & L. Assn. vs. Denson, 189 U. S. 408, 23 Sup. Ct. 630.

The modern tendency is to put foreign corporations upon the same footing as natural persons in regard to jurisdiction of suits by or against them in foreign jurisdictions.

Barrow S. S. Co. vs. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 528.

Service based on a single transaction within a state under a similar state service statute was sustained by this court, the inferior federal courts, and other state courts of last resort.

Commercial Mut. Acc. Co. vs. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 447-8;

Conn. Mut. Life Ins. Co. vs. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 312;

Meade Fibre Co. vs. Varn, 3 Fed. (2d) 520 (C. C. A., 4th Cir., 1925, certiorari denied 269 U. S. 564, 46 S. Ct. 23);

Premo Specialty Mfg. Co. vs. Jersey Creme Co., 200 Fed. 352 (C. C. A., 9th Cir., 1912);

Dungan Hood & Co. vs. Bally, 271 Fed. 517 (D. C. Pa., 1921);

Brush Creek C. & M. Co. vs. Morgan-Gardner El. Co., 136 Fed. 505 (C. C. Mo., 1905);

New Haven P. & B. Co. vs. Downington M. Co., 130 Fed. 605 (C. C. Conn., 1904);

Houston vs. Filer & S. Co., 85 Fed. 757 (C. C. Ill., 1989);

A. Harvey's Sons Mfg. Co. vs. Sterling M. Co., 225 N. W. 538 (Mich., 1929);

St. Mary's Oil Engine Co. vs. Jackson Ice & Fuel Co., 138 So. 834 (Ala., 1931);

Abbeville Electric L. & P. Co. vs. Western El. S. Co., 61 S. C. 361, 39 S. E. 559.

The validity of statutes permitting service of process on nonresident motorists by delivery of process to the State Registrar and mailing a copy to the motorists (*Hess vs. Pawlowski,* 274 U. S. 352, 47 Sup. Ct. 632) sustains the service in this case.

Appellant's argument that a single transaction is not sufficient to sustain service is based on a line of federal cases which are entirely inapplicable because those cases involved the construction of the service statute and not its constitutionality. This distinction is recognized by the cases decided by this court.

V.

The Fact That the Cause of Action May Have Arisen Out of a Transaction Outside the State Does Not Affect the State's Jurisdiction.

This rule is supported by the great weight of authority (see scores of cases cited in *30 A. L. R. 258*, including many United States Supreme Court decisions cited infra, p. 40).

Appellant's contention that a state may not take jurisdiction of a cause of action arising outside of the state is based upon the misconception of the cases appellant cites.

VI.

A Foreign Corporation Is Amenable to Service of Process by Service on Its Officer Within the State, Where It Is Doing Business Within the State by a Subsidiary Corporation.

It is unnecessary to determine this question in this case, but there is no constitutional objection to permitting service of process upon an officer of a parent company who comes into the state on the parent company's business when the parent company is doing business in the state through the agency of a wholly owned and controlled subsidiary corporation.

Argument.

I.

Judge Gregory's Return to the Alternative Writ of Prohibition Stands Admitted and Cannot Be Impeached by Appellant.

Appellant seeks to attack that part of Judge Gregory's return to the alternative writ of prohibition (Appellant's Brief, pp. 30-34) wherein the judge found that Mr. Ruppprecht came to Wisconsin to settle the controversy between appellant corporation and the seven Wisconsin bondholders. But appellant cannot raise that question for a number of reasons. In the first place, by demurring to the return in the state Supreme Court, appellant admitted the allegations of the return, regardless whether the allegations are fully supported by the affidavits. If appellant was dissatisfied with the return or desired to take any issue with it, it had the privilege, under the Wisconsin procedure, of taking issue with the return and having the issue tried. Under the Wisconsin procedure when a party sues out an alternative writ of prohibition in the state Supreme Court, the alternative writ constitutes a complaint and the return constitutes the answer and if there is an issue of fact, it may be tried. The Wisconsin statutes provide that in case there are any issues of fact upon a proceeding instituted in the Supreme Court for a writ of prohibition, such issues of fact may be tried in the usual way as any personal actions. *Wisconsin Statutes, Sections 293.03, 293.08, 293.10, 293.12* (found in the official printed edition of the Wisconsin Statutes for the year 1931 at pp. 2129, 2130). The result is that the return of Judge Gregory is like an answer in an ordi-

nary case and a demurrer thereto admits the allegations thereof.

Secondly, Judge Gregory's return cannot be questioned in this court because the return was not challenged in the assignment of errors (R. 2-3) and under Rule 27 (paragraph 4) of this court an error not specified will be disregarded. Rule 27 (paragraph 4) refers to the necessity of assignments of errors required by Section 997 of the Revised Statutes *(28 U. S. C. A., Section 862)*. That statute refers to a writ of error, but by *28 U. S. C. A., Section 861b* the requirement of assignment of errors is extended to appeal which was substituted for the writ of error. This court will not review an alleged error which has not been raised in the assignment of errors.

Paraiso vs. United States, 207 U. S. 368, 28 Sup. Ct. 127 (syl. 4).

Wood vs. Wilbert's Sons S & L Co., 226 U. S. 384, 33 Sup. Ct. 125.

Behn Meyer & Co. vs. Campbell, 205 U. S. 403, 27 Sup. Ct. 502.

Furthermore, Judge Gregory's return is supported by the affidavits of Mr. Rupprecht and Mr. Gold and the reasonable inferences to be drawn from those affidavits. Throughout its brief the appellant argues that Mr. Rupprecht came all the way from New York to Milwaukee merely for the purpose of preventing the entry of judgment on the $368 Stegeman action in New York. Appellant's third and fourth assignment of errors (R. 3) admit Mr. Rupprecht came to Wisconsin to "compromise" the New York action; and Mr. Rupprecht admits in his own affidavit that he came not only for the prupose of compromising the New York action but to attempt to persuade

the Wisconsin bondholders to deposit their bonds with appellant's committee (R. 15). The claim on page 33 of appellant's brief, that "Mr. Rupprecht's solicitation of the deposit of the bonds with the committee was primarily in its behalf," insinuating that in that respect he was not acting for appellant corporation, is contrary to the entire record and the admissions in Mr. Rupprecht's own affidavit (R. 14-15). The purpose of appellant in sending Mr. Rupprecht to Wisconsin was to have him somehow adjust its controversy with the Wisconsin bondholders on the principal and unpaid interest on their bonds, totalling over $15,000. Settlement of the controversy with the Wisconsin bondholders does not necessarily mean payment. Any satisfactory disposition of their claims so the Wisconsin bondholders would not press or sue the appellant corporation for payment of the defaulted bonds would be classed as a settlement, and that is exactly what appellant corporation sent Mr. Rupprecht to Milwaukee to accomplish.

In any event whether Mr. Rupprecht came to Wisconsin to settle or compromise the claims of all seven Wisconsin bondholders or, merely, as Mr. Rupprecht claims in his affidavit (R. 15), to persuade them against entry of judgment in the New York action and to deposit their bonds with appellant's committee, is immaterial. The fact remains that Mr. Rupprecht was sent to Wisconsin by his corporation on the corporation's business to attempt to accomplish a result in connection with the very subject matter sued on and which would be very beneficial to the corporation. The Wisconsin actions were commenced on the claims concerning which Mr. Rupprecht came to Wisconsin. Even if he had no other business in Wisconsin, Mr. Rupprecht came to Wisconsin on the corporation's

business which, as he admits in his affidavit (R. 14), was very serious and important to the appellant corporation.

II.

A Single Transaction in Wisconsin Constitutes "Conducting Business" Within the State Under the Wisconsin Process Service Statute So As To Make a Foreign Corporation Amenable to Service of Process in Wisconsin.

The Wisconsin statute regulating service of process upon foreign corporations in Wisconsin is *Wis. Stats., Section 262.09* (official printed edition of the Wisconsin Statutes for the year 1931, pp. 1970-1). The material portions of the statute are as follows:

> "*262.09 Service on Corporations.* Actions against corporations shall be commenced in the same manner as personal actions against natural persons. The summons and the accompanying complaint or notice aforesaid shall be served, and such service held of the same effect as personal service on a natural person, by delivering a copy thereof as follows:
>
> * * *
>
> "(13) If against any other foreign corporation, to any such officer being within the state, or to any agent having charge of or *conducting any business therefor in this state,* or any trustee or assignee of such corporation, or upon the secretary of state, as provided in Section 226.02. But such service can be made upon a foreign corporation only either when it has property within the state or the cause of action arose therein, or the cause of action exists

in favor of a resident of the state, and upon the secretary of state only when the cause of action arises out of business transacted in this state or when the defendant has property therein."

The words "such officer" in *subdivision 13 of Section 262.09* refer to the officers enumerated in *Wisconsin Statutes, Section 262.09(10),* which enumerates the president, vice-president, secretary, treasurer, etc. as the officers to whom copies of process may be delivered.

It has been the settled rule in Wisconsin since the decision in *Fond du Lac C. & B. Co. vs. Henningsen Produce Co.,* 141 Wis. 70, 123 N. W. 640 (1909), that a single transaction by an unlicensed foreign corporation within the State of Wisconsin by an authorized officer constitutes "conducting any business" in the state within the meaning of *Wis. Stats., Section 262.09(13)* above quoted, and makes the corporation amenable to service of process in Wisconsin. In that case it was held that service upon the secretary of an unlicensed foreign corporation who came to Wisconsin for the single purpose of attempting to settle the claim sued on against the corporation, was valid, and that the service under the statute satisfies the requirements of due process of law, the officer's presence on the business of the corporation being the presence of the corporation within the state. In that case the court said *(141 Wis. 73):*

"A corporation ordinarily acts and moves in the person of some individual, and when any individual, officer, or agent is, within the authority committed to him, performing an act of the corporation, the latter must be deemed present physically in the per-

> son exercising its powers. * * * In other words, Henningsen at that time and for that definite purpose was the corporation, which, therefore, was present in this state. Hence there is no obstacle in the inherent limitations on the powers of the state, or in any prohibitions of the federal constitution, to the acquisition of jurisdiction by our courts by personal service of their process on the defendant present within our borders."

In *Minneapolis Threshing Mach. Co. vs. Ashauer,* 142 Wis. 646, 649, 126 N. W. 113 the Wisconsin court held that *Section 262.09(13)*

> "indicates a policy of broad liberality in enabling personal jurisdiction over foreign corporations where the subject matter is properly within the jurisdiction of our courts";

and held that the statute is valid and satisfies the requirements of due process of law.

By the foregoing cases Wisconsin has been definitely committed to the doctrine that a single transaction in the state by a foreign corporation constitutes "conducting any business" within the state under *Section 262.09(13)* so as to subject the foreign corporation to the service of process in Wisconsin. This rule is in accord with the long established rule in Wisconsin that a single contract or transaction constitutes a violation of the licensing statute. *Wis. Stats., Section 226.02* (official printed edition of the Wisconsin Statutes for the year 1932, page 1846.) That section provides that no foreign corporation shall "transact business" in Wisconsin until it shall have been licensed

therein. *Wisconsin Statutes, Section 226.02(9) provides* that every contract made by or on behalf of an unlicensed corporation within the state shall be void. The Wisconsin Supreme Court has uniformly held that a single contract or transaction within the state of Wisconsin by an unlicensed foreign corporation comes within the prohibition of *Section 226.02.*

Southwestern Slate Co. vs. Stephens, 139 Wis. 616, 120 N. W. 408.

Duluth Music Co. vs. Clancy, 139 Wis. 189, 120 N. W. 854.

Alien vs. Milwaukee, 128 Wis. 678, 106 N. W. 1099.

Sprout Waldron & Co. vs. Amery M. Co., 162 Wis. 279, 156 N. W. 158.

First Wisconsin Trust Company vs. Munday, 168 Wis. 31, 168 N. W. 393.

Phoenix Nursery Co. vs. Trostel, 166 Wis. 215, 164 N. W. 995.

State ex rel Rubber Co. vs. Gregory, 205 Wis. 189, 236 N. W. 524.

In sustaining the service on appellant corporation in the instant case, the Wisconsin Supreme Court followed its rulings in the earlier cases and reaffirmed the Wisconsin rule that a single transaction in the state by a foreign corporation constitutes "conducting any business" within the state within the process service statute. Such being the construction placed upon the Wisconsin statute by the highest court of the state, that construcion must be accepted by the United States Supreme Court on review, as though it had been specifically expressed in the statute.

Quong Ham Wah Co. vs. Industrial Commission, 255 U. S. 445, 41 Sup. Ct. 373.

Supreme Lodge vs. Meyer, 265 U. S. 30, 44 Sup. Ct. 432; and many cases cited in note 72 to 28 U. S. C. A., Sec. 344.

Hence this court must accept the construction of the Wisconsin process service statute as though the statute specifically authorized service on Mr. Rupprecht when he came to Wisconsin in relation to the matter sued on, under the facts here involved. Even though this court might consider the Wisconsin Supreme Court's construction of the Wisconsin statute broader than the language of the statute appeared to warrant, or even that the construction is erroneous, that does not constitute a denial of due process of law and the construction is binding upon the federal courts.

Pennsylvania Fire Ins. Co. vs. Gold Issue M. & M. Co., 243 U. S. 93, 37 Sup. Ct. 344.

III.

By Sending Its President to Wisconsin to Attempt to Settle a Number of Claims Against It, or to Accomplish a Result in Connection With the Matter Sued On, Appellant Corporation Became Amenable to Service of Process in Wisconsin.

The Supreme Court of Wisconsin concluded (opinion, R. 38-44) that by sending its president to Wisconsin under the circumstances and facts already stated, appellant was present and conducting business in Wisconsin through the presence of its president and became amenable to service of process in Wisconsin under the service statute above quoted (page 14, supra). Whether Mr. Rupprecht came

to Wisconsin to settle or compromise the claims of all seven Wisconsin bondholders, or, merely, as Mr. Rupprecht claims in his affidavit (R. 15), to persuade them against entry of judgment in the New York action and to deposit their bonds with appellant's committee, is immaterial. The fact remains that Mr. Rupprecht was sent to Wisconsin by his corporation on the corporation's business to attempt to accomplish a result in connection with the very subject matter sued on and which would be very beneficial to the corporation. The Wisconsin Supreme Court construed his activities in Wisconsin as coming within the Wisconsin process service statute, *Wis. Stats., Section 262.09(13)* as constituting "*conducting any business*" within the meaning of that statute, and that appellant corporation was physically present in the state of Wisconsin when its president came here on that mission, which was the corporation's business. The plaintiff is a citizen and resident of the State of Wisconsin, the person served was an officer of the defendant corporation, and at the time of service he was "conducting any business" for his corporation. Hence the service was made as required by the Wisconsin process service statute. Even disregarding the business Mr. Rupprecht had with his corporation's customers in Wisconsin, his coming to Wisconsin on the single transaction for his corporation was sufficient to bring the corporation within the state so as to subject it to the jurisdiction of Wisconsin courts under the State Supreme Court's construction of the statute.

It seems to us that the Wisconsin Supreme Court's reasoning is persuasive that the state court's taking jurisdiction over appellant corporation is not subversive of due process of law. In its opinion, the Wisconsin Supreme

Court points out the distinction under the Wisconsin statute between service upon an officer and service upon an agent (R. 39-40):

> "The validity of the service on a foreign corporation by serving process on an agent or secretary of state may depend on a showing of a continuous course of business, while service upon its president or other officer designated by statute through and by whom the corporation has entered the state for a special and for its own peculiar purpose, even though it amounts to a single transaction, may be perfectly good. It is perceived that the statute does not constitute a single transaction of an isolated nature a sufficient disclosure of the corporate presence to support a service on an agent or secretary of state, Penn Collieries vs. McKeever, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. n. s. 127, while it does provide for such service on the president or other proper officer if in the state for the purposes of a corporation, when the cause of action exists in favor of a resident of the state and arises out of the matter, to control which the corporation has come within the state. Under one mode of service, for the purpose of discovering the presence of the corporation, the inquiry involves the extent of business done, under the other we are concerned only with the question as to whether the corporation has so acted as to manifest its presence in the person of its officers to the extent that we may say, it was here at the time and subject to service of process."

Again the Wisconsin court said (R. 40):

"*It is conceded that the president of the corporation came into this state in an attempt to accomplish a result in connection with the matter sued on which would be beneficial to the defendant in that action* because of the emergency in which it found itself after its default on its bonds. A foreign corporation is present in this state when an officer thereof, vested with authority, is here transacting business for it. The corporation under such circumstances is not merely represented for its own purpose, but it is actually here, and it must accept the plain and unavoidable consequence of being held to be within the jurisdiction of our courts."

(R. 41):

"* * * *here the petitioner deliberately entered the state for the purpose of negotiating with reference to the very matter out of which the suit arises.*"

(R. 42-43):

"In the nature of things it (a corporation) must act through persons who represent it. There is just as definitely a group will and ability to form a plan or intention to act as is found in an individual. In order to avoid confusion and to prevent imposition the corporation's domicile and the place where it may be said to be found are fixed as definitely as can be and at the same time prevent undue advantage and injustice. *The effect of our legislation with relation to jurisdiction over foreign corporations amounts to this, a corporation is found within the state when its president or other chief officer, vice-*

president, secretary, cashier, treasurer, director or managing agent is within the state and conducting business for such corporation; it is here for the purposes relating to the business it has come to transact. Had the business transacted been that of Mr. Rupprecht and had he been found in the state of Wisconsin, certainly service could have been made upon him. The only way the corporation whose business he was authorized to transact could act in relation thereto was by doing so by and through its representative. He had authority to speak on behalf of the company, for the time being the company was manifesting its presence in his person and acts, it was doing its business here in Wisconsin and protecting its interests through him. As an individual Rupprecht might have come into the state without bringing the corporation with him, but as an officer coming here by direction of the corporation to manage and do the particular business of the corporation, he did bring the corporation with him. To hesitate so to hold is making a question of a patent fact. Fond du Lac C. & B. Co. vs. Henningsen, 141 Wis. 70; Premo Specialty Mfg. Co. vs. Jersey Creme Co., 280 Fed. 352; 43 L. R. A. (n. s.) 1015."

In its opinion in the instant case the Supreme Court of Wisconsin considered (R. 43) that its ruling was in accord with *Commercial Mut. Acc. Co. vs. Davis,* 213 U. S. 245, 29 Sup. Ct. 446.

IV.

Service Under the Wisconsin Statute on An Authorized Officer of a Foreign Corporation Who Comes Into the State to Settle or Deal With the Matter Sued on Does Not Violate Due Process of Law.

There is no merit in appellant's claim that the Wisconsin process service statute is unconstitutional and that appellant has been denied due process of law by the state court's ruling sustaining the service. The due process clause of the federal constitution has not fixed the amount of business a foreign corporation must do in a state in order to be amenable to the process of its courts. This court has held that the states have great latitude in defining what constitutes "doing business" by foreign corporations within their borders for the purpose of making such corporations amenable to the process of their courts.

Green vs. Chicago, etc. R. Co., 205 U. S. 530, 27 Sup. Ct. 595, 596.

International Harvester Co. vs. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 945.

The constant tendency of judicial decisions in modern times has been to allow the states greater latitude in taking jurisdiction over foreign corporations. *Barrow S. S. Co. vs. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 528.

It is well settled by federal as well as state decisions that the determination of the question whether a foreign corporation is doing business within a state so as to be subject to suit therein depends on the facts of each particular case.

International Harvester Co. vs. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944, 945.

St. Louis S. W. R. Co. vs. Alexander, 237 U. S. 218, 33 Sup. Ct. 245, 247.

State, ex rel P. R. Co. vs. Circuit Court, 178 Wis. 648, 656, 190 N. W. 366.

Tetley, etc. vs. Rock Falls Mfg. Co., 176 Wis. 400, 403, 187 N. W. 204.

Of course, the facts of each case include not only the acts constituting the doing business, but also the language of the process service statute.

The federal courts recognize that it is the character and power of the one served as the agent of the corporation which is the test of the right to acquire jurisdiction over the corporation. Due process merely prohibits the states from extending their authority beyond their jurisdiction so as to condemn the resident of another state only when neither his person nor his property is within the jurisdiction of the court rendering the judgment. *Riverside Cotton Mills vs. Menefee,* 237 U. S. 589, 35 Sup. Ct. 579, 581.

The purpose of process service statutes of the type involved in this case is to insure that the foreign corporation will receive reasonable notice of the commencement of the action through an authorized representative in the state on the business of the corporation and if such purpose is fulfilled, the requirements of due process are met. *Denver R. G. R. Co. vs. Roller,* 100 Fed. 738, 741 (C. C. A., 9th Cir.).

> "When a foreign corporation comes into this state, the Legislature, by virtue of its control over the law of remedies, may define the agents of the corporation on whom process may be served. Lafayette Ins. Co. vs. French, supra. If the persons named are true agents, and if their positions are such as to lead to a just presumption that notice to them will be notice to the principal, the corporation must submit.

Mut. L. Ins. Co. vs. Spratley, supra; Commercial Mut. Acc. Co. vs. Davis, supra." Cardozo, J., in *Tauza vs. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915, 918.

The rule that a single transaction within a state by a foreign corporation constitutes sufficient "conducting any business" within the state under a process service statute like Wisconsin's, as to make a corporation amenable to the courts of such state, has not been challenged by any of the federal decisions. We have been unable to find any decision, and appellant cites none, holding that it is beyond the power of the states to legislate that a single transaction shall be sufficient business within the state to make the foreign corporation amenable to the process of the courts of the state in which the transaction is done. On the contrary, this court has held that there is no constitutional objection to making a single transaction constitute "doing business" in the state under a state constitutional and statutory licensing requirement. *Chattanooga Nat. B. & L. Ass. vs. Denson,* 189 U. S. 408, 23 Sup. Ct. 630. This case is all the more persuasive in favor of the validity of the Wisconsin statute because it does not take as much activity within the state to constitute "doing business" under a process service statute as under a licensing statute.

"* * * activities insufficient to make out the transaction of business, within the meaning of those (licensing) statutes, may yet be sufficient to bring the corporation within the state so as to render it amenable to process." *Tauza vs. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915, 917.

There is no precise test of the nature or extent of the business that must be done to constitute "doing business"

in the state. *Commercial Mut. Acc. Co. vs. Davis,* 213 U. S. 245, 29 Sup. Ct. 445, 448; *Tauza vs. Susquehanna Coal Co.,* 220 N. Y. 259, 115 N. E. 915, 918. The extent of the business required is for the state to determine. *Chattanooga Nat. B. & L. Ass. vs. Denson,* 189 U. S. 408, 23 Sup. Ct. 630.

When it comes to determine whether service of process under circumstances such as are here involved is in accord with due process, it is not a question as to how much business is done in the state. The number of acts required to constitute doing business in a state may be properly considered upon *construction* of a service statute requiring a foreign corporation to be doing business in the state to be amenable to its process. But due process is not concerned with the amount of business done in the state. Due process merely requires reasonable notice of suit by service on an authorized representative within the state on the corporation's business, and an opportunity to defend. *Denver & R. G. R. Co. vs. Roller,* 100 Fed. 738, 741.

When a natural person comes into a foreign state, he carries with him all his personal liabilities and he may be served there. There is no reason why a corporation should be entitled to any greater exemption when it comes into a foreign state through an authorized officer to transact some corporate business. How can a statute, providing that a single transaction in the state by an authorized officer shall make the corporation amenable to service through such officer, be so unreasonable as to be contrary to due process, when service on an individual under the same circumstances is concededly valid?

A corporation can act only through individuals, and when any individual officer or agent is acting within the authority committed to him, he is performing an act of the corporation, and the corporation must then be deemed to be physically present through the individual exercising its

powers within the State. *St. Clair vs. Cox,* 106 U. S. 350, 1 Sup. Ct. 354, 356, 361.

"The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural presons in regard to the jurisdiction of suits by or against them." *Barrow S. S. Co. vs. Kane,* 170 U. S. 100, 18 Sup. Ct. 526, 528.

This court has decided a number of times that State process service statutes like Wisconsin's were valid and not repugnant to due process and under such statutes sustained the service upon an officer or agent whom the foreign corporation sent into the State to represent it in connection with the matter sued on, even though the officer or agent went into the State for that single transaction.

Commercial Mut. Acc. Co. vs. Davis, 213 U. S. 245, 29 S. Ct. 445, 447-8.

Conn. Mut. Life Ins. Co. vs. Spratley, 172 U. S. 602, 19 S. Ct. 308, 312.

Inferior Federal courts came to the same conclusion.

Meade Fibre Co. vs. Varn, 3 Fed. (2d) 520 (C. C. A., 4th Cir., 1925, certiorari denied 269 U. S. 564, 46 S. Ct. 23).

Premo Specialty Mfg. Co. vs. Jersey Creme Co., 200 Fed. 352 (C. C. A., 9th Cir., 1912).

Dungan Hood & Co. vs. Bally, 271 Fed. 517 (D. C. Pa., 1921).

Brush Creek C & M Co. vs. Morgan-Gardner El. Co., 136 Fed. 505 (C. C. Mo., 1905).

New Haven P & B Co. vs. Downington M Co., 130 Fed. 605 (C. C. Conn., 1904).

Houston vs. Filer & S. Co., 85 Fed. 757 (C. C. Ill., 1898).

And so have State courts of last resort in addition to the Wisconsin court.

A. Harvey's Sons Mfg. Co. vs. Sterling M. Co., 225 N. W. 538 (Mich., 1929).

St. Mary's Oil Engine Co. vs. Jackson Ice & Fuel Co., 138 So. 834 (Ala., 1931).

Abbeville Electric L. & P. Co. vs. Western El. S. Co., 61 S. C. 361, 39 S. E. 559.

The rule of those cases is that whenever a corporation sends an officer or agent into the state of the plaintiff's residence and authorizes the officer to represent the corporation in a particular transaction, it voluntarily comes into the state with reference to that transaction and is amenable to suit thereon in the state.

In *Commercial Mut. Acc. Co. vs. Davis*, 213 U. S. 245, 29 Sup. Ct. 445 the state statute considered was like the Wisconsin statute. It provided that service upon a foreign corporation might be made by serving an officer, agent or employee in any county where such service might be obtained. In case of insurance corporations, the statute authorized service by delivery of a copy of the process to any person in the state who should solicit insurance for the corporation or make any contract of insurance or collect any premiums, or who should adjust or settle a loss or in any manner aid in doing either. Service was obtained by serving an agent whom the corporation sent into the state to adjust the claim. *This court held* that the service was valid and not in contravention of due process, holding that a representative of a foreign insurance company who comes into the state clothed with full authority to adjust a claim is one "who adjusts or settles a loss" within the meaning

of the statute, *although in fact the loss was not actually settled.* The court said *(29 Sup. Ct. 447-8)*:

> "It was competent for the state, keeping within lawful bounds, to designate the agent upon whom process might be served. It chose to enact a statute providing that an agent competent by authority of the company to settle and adjust losses should be competent to represent the company for the service of process. When the company sent such an agent into Missouri, by force of the statute he is presumed to represent the company for the purpose of service, and to be vested with authority in respect to such service so far as to make it known to the foreign corporation thus coming within the state and subjecting itself to its laws. * * *
>
> "It is not necessary that express authority to receive service of process be shown. The law of the state may designate an agent upon whom service may be made, if he be one sustaining such relation to the company that the state may designate him for that purpose, exercising legislative power within the lawful bounds of due process of law. This was held in effect in Connecticut Mut. L. Ins. Co. vs. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308.
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> "We think the state did not exceed its power and did no injustice to the corporation by requiring that, when it clothed an agent with authority to adjust or settle the loss, such agent should be competent to receive notice, for the company, of an action concerning the same."

In *Conn. Mut. Life Ins. Co. vs. Spratley,* 172 U. S. 602, 19 Sup. Ct. 308, the Tennessee statute considered provided

that any foreign corporation found doing business in the state should be subject to suit there in relation to any transactions had within the state or to any cause of action arising within the state; that any transaction with persons or concerning any property situated in the state, through any agency whatever, acting for it within the state, should be held to be doing business within the meaning of the statute; that process might be served upon any agent of the corporation found within the county where the suit is brought no matter what character of agent he may be. Plaintiff sent an agent into the state to investigate the death of the defendant's husband with authortiy to compromise the claim. While the agent was engaged in negotiation with the defendant, and after she had refused to accept his offer, he was served with process. The insurance company commenced an action after a default judgment was rendered against it, to restrain enforcement of the judgment. The Supreme Court of Tennessee held the judgment valid.

This court affirmed the state judgment, holding that since the agent on whom process was served in the case was sufficiently representative, the state court acquired jurisdiction over the corporation and the corporation was not denied due process of law. The court said (19 Sup. Ct. 312):

> "It is admitted that the person upon whom process was served was an agent of the company. Was he sufficiently representative in his character? He was sent into the state as such agent to investigate in regard to this very claim, and while there he was empowered to compromise it within certain stated terms, leaving him a certain discretion as to the amount. He was authorized to settle the claim for the amount of the reserve 'or thereabouts.' He did

> not leave his character as agent when he entered the state. On the contrary, it was as agent, and for the purpose of representing the company therein, that he entered the state, and as agent he was seeking a compromise of the claim by the authority of the company, and therein representing it. Why was he not such an agent as it would be proper to serve process upon?

Appellant recognizes that the two foregoing cases are favorable to the respondent but attempts to distinguish them by claiming (Appellant's Brief, pp. 34-37) that the rulings were not predicated on the single transaction which the agent came into the state to adjust. However, the controlling basis of the decisions was the fact that an agent was sent into the state authorized to deal with the subject matter of the suit, and that transaction alone was considered sufficient to authorize valid service. The court did not say that the absence of the additional business which the corporation had done in the state, other than by the agent sent into the state to attempt to adjust the loss, would have rendered the service invalid. Appellant seeks to further distinguish (Appellant's Brief, p. 37) those cases on the ground the defendants were insurance companies and that agents attempting to adjust insurance losses were engaged in the ordinary and usual business of their corporations while, in the instant case, the adjustment of a claim against appellant is merely incidental to its business of dealing in textiles. This type of argument strikes us as shocking. It seems to us that payment of its debts to its bondholders who furnished the appellant with the capital to carry on its business is just as important a part of its business as its textile business.

Following are some illustrative quotations from some of the other foregoing cases which sustained service on an agent sent into the state for a single transaction.

"* * * but the general manager was, for the time being, in the matter in which he was sent, the corporation, and brought to this county and district the presence of the corporation as effectually as that could be done. The corporation sending him to transact the corporate business was, within the limits of that business, itself present." *Houston vs. Filer & Stowell Co.*, 85 Fed. 757.

"Any individual may be served in any state where he is found without regard to the place of his residence. A corporation is entitled to no greater exemption. It ought to be held to be present in any state to which it sends its general officer for the transaction of its corporate business." *Brush Creek Coal & M. Co. vs. Morgan-Gardner Electric Co.*, 136 Fed. 505, 507.

"It would seem ungracious for the defendant to permit its agent to visit Connecticut concerning matters which touch one branch of a transaction, and to object to service upon such agent of a notice that the plaintiff seeks to recoup in one direction what it has lately lost in another. * * *

"It is impossible to assent to the proposition that doing business within a state means a persistent or continuous condition of doing or offering to do business, usually leading to the appointment of an agent or the establishment of an office within the state."

New Haven Pulp & Board Co. vs. Downington Mfg. Co., 130 Fed. 605, 608.

"The service of process upon an agent of a foreign corporation, who comes into the jurisdiction of the court upon the business of the corporation which is the subject of the suit in which service is made, appears to be above all other class of agents the one upon whom service should be made, in order that notice may be promptly given to the corporation, and that it may be fully advised in the premises, and we see no reason why the foreign corporation doing business within the jurisdiction under such circumstances should not be bound by such service." *Premo Specialty Mfg. Co. vs. Jersey-Creme Co.,* 200 Fed. 352, 359. (This case approves and follows the Wisconsin rule as laid down in *Fond du Lac C. & B. Co. vs. Henningsen Produce Co.,* 141 Wis. 70.)

"The object of the service of any legal process is to notify the party served of the proceeding against him, and to obtain jurisdiction of his person; and both of these objects are attained where a person, whether a nonresident or a resident of this state, has been personally served within the jurisdiction of the court where such proceeding is pending. * * * But, as we understand the decisions of the supreme court of the United States, there is no difference whether the question is as to the service of an individual nonresident and a foreign corporation, provided the service, in case of a corporation, is made upon an officer or agent of the corporation, who is acting as the representative of such

corporation at the time of service, * * * as is held in the case last cited (Insurance Co. vs. Spratley, 172 U. S. 602, 19 Sup. Ct. 308), the character of the agency depends upon the inquiry whether the agent can be regarded as the representative of the corporation in respect to the transaction out of which the suit arises. * * * For, as said by Mr. Justice Field in St. Clair vs. Cox at page 359, 106 U. S., page 362, 1 Sup. Ct., and page 226, 27 L. Ed.: While 'service upon an agent of a foreign corporation will not be deemed sufficient unless he represents the corporation in the state where such service is made, yet, if he is the representative of the corporation in the state at the time the service is made, such service would be sufficient; and this representation implies that the corporation does business or has business in the state, for the transaction of which it sends or appoints an agent there.'" *Abbeville Electric L. & P. Co. vs. Western Electrical S. Co.*, 61 S. C. 361, 39 S. E. 559, 566.

That the Wisconsin process service statute and the actual service made upon the appellant in this case, are not unreasonable, and not in derogation of due process, is apparent when it is considered that this court held that service on a non-resident motorist by delivery of process to the State Registrar and mailing a copy to the motorist, is constitutional. *Hess vs. Pawloski,* 274 U. S. 352, 47 Sup. Ct. 632.

The appellant's argument that a single transaction by a foreign corporation within the state is not sufficient, but that there must be a continuous course of business within

the state to make the corporation amenable to service of process, is based on a line of federal cases (discussed on pages 22-30, 38-41 of Appellant's Brief) which are entirely inapplicable. Those federal cases are inapplicable because in those cases which held the service invalid jurisdiction was grounded upon statutes far different from the Wisconsin statute, statutes which required the foreign corporation to be doing sufficient business so as to "be found," or "reside" within the state or district where the action was brought. The difference between the decisions in the state and federal courts upon the validity of service is based upon this difference in the service statutes. This distinction is clearly pointed out in the much cited case of *Green vs. Chicago B. & Q. R. Co.,* 205 U. S. 530, 27 Sup. Ct. 595, 596. In that case the service was held insufficient because it did not come within the purview of the federal service statute considered by the court. The court pointed out that the decision was based on the federal statute and that the cases in which a contrary conclusion was reached were state decisions which involved "*the interpretation of a state statute and the jurisdiction of the state courts.*" *The court conceded that the service would have been upheld had service been tested by the state service statute.* This distinguishing feature of the federal cases is also pointed out in a learned opinion in *Bristol vs. Brent,* 110 Pac. 356, 358, 38 Utah 58, where it is said:

> "The Supreme Court of the United States, as well as many other courts that have had occasion to pass upon the subject, have always based their decisions, to a large extent at least, upon the terms of the particular statute in question."

Again, this distinction is clearly pointed out in the late case of *Eastman Kodak Co. vs. Southern P. M. Co.,* 273 U. S. 359, 47 Sup. Ct. 400. That case holds that the amount of business to be done so that the corporation may be said to "reside" or "to be found" in the state is much more than the amount required in order to constitute "transacting business" in the state.

Likewise, the service was sustained in *St. Louis S. W. R. Co. vs. Alexander,* 227 U. S. 218, 33 Sup. Ct. 245, where in construing the process service provision under the Carmack amendment, which was much broader in scope than the general federal service statute, it was held (syllabus 3):

> "A foreign railway corporation is doing business in the state so far as the question of its amenability to service of process there is concerned, where its local representative undertakes to act for and represent it negotiating for it, and in its behalf declining to adjust a claim made against it."

The federal jurisdiction and venue statutes confer a limited jurisdiction on the federal courts and are far more limited in scope than statutes like *Wis. Stats., Section 262.09(13).* The general federal jurisdiction and venue statute is now *Judicial Code, Section 51 (28 U. S. C. A. Section 112)* which provides:

> "No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only

in the district of the residence of either the plaintiff or defendant."

Most of the federal cases refer to the requirement that to be subject to service the foreign corporation must "reside" or "be found" in the district where suit is brought. The reason the words "be found" are used in some cases is that special federal statutes regulate the service of process in special cases and allow service on foreign corporations not only where they may "reside" but also where they may "be found" (e. g. Anti-Trust Law, referred to in *Eastman* case, *supra,* and *Copyright Law),* and special acts conferring jurisdiction on the federal courts in particular cases supersede the general statute defining jurisdiction and venue in the federal courts. (See cases cited in *28 U. S. C. A., Section 112, note 32.*)

Even upon removal of a case from a state to a federal court for diversity of citizenship, the question of validity of service seems to be tested by the federal statutes.

Goldey vs. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 561.

Lowitz vs. Kimmerle, 221 Fed. 857 (C. C. A. 6th Circuit 1915, Certiorari denied, 35 Sup. Ct. 941).

Case vs. Smith & Co., 152 Fed. 730.

West vs. Cincinnati R. Co., 170 Fed. 349.

Vitkus vs. Clyde Co., 232 Fed. 288.

Now, when the distinction between the federal and state process service statutes is borne in mind, the federal cases discussed on pages 22-30, 38-41 of Appellant's Brief are entirely reconciled with state decisions sustaining service

on foreign corporations under service statutes like *Wis. Stats., Section 262.09(13).* Those cases discussed by appellant which held the service of process invalid, are inapplicable and distinguishable, because those cases were not based on due process, but either (1) upon construction of the jurisdiction of the Federal Courts under process service statutes which required the foreign corporation "to reside" or "to be found" or "to be an inhabitant" in the district, and such statutes were construed to require more than one transaction to be done in the district to make the corporation amenable to service of process there; or (2) the officer was in the State or district only on his private affairs and hence could not be deemed to represent the corporation at all. It is only when the officer served was in the state only on his private affairs that the service was held invalid as denial of due process.

The service upon a foreign corporation was set aside because the corporation was not "present" within the district and the officer served was in the district only on his private affairs in *Philadelphia & R. R. Co. vs. McKibbin,* 243 U. S. 264, 37 Sup. Ct. 280: because the corporation was "not found" in the district in *James H. Dickinson F. M. Co. vs. Harry,* 273 U. S. 119, 47 Sup. Ct. 308; because the corporation was not "present there" in *Bank of America vs. Whitney Bank,* 261 U. S. 171, 43 Sup. Ct. 311; because the corporation was not "an inhabitant" or "found" in the district as required by the federal venue statute in *Lumiere vs. Wilder,* 261 U. S. 174, 43 Sup. Ct. 312; because the corporation was not "found" nor "present" in the district in *Rosenberg Bros. Co. vs. Curtis Brown Co.,* 260 U. S. 516, 43 Sup. Ct. 170; because the corporation was not "present" in the district as required by the federal stat-

ute in *Green vs. Chicago, etc. R. Co.,* 205 U. S. 530, 27 Sup. Ct. 595, 596.

The inferior federal court cases cited on page 38 of Appellant's Brief likewise are based on the federal process service statute requiring the corporation to be "found" within the district in order to make the corporation amenable to service there.

All the aforementioned cases were cases on the *construction* of the requirements of the service statute and not its validity. Cases like *Riverside Cotton Mills vs. Menefee,* 237 U. S. 189, 35 Sup. Ct. 579, and *Conley vs. Mathieson Alkali Works,* 190 U. S. 406, 23 Sup. Ct. 728, are entirely inapplicable, becaues those cases merely held that service upon a resident director of a foreign corporation who was not doing anything for the corporation in the state and which transacted no business and had no property in the state, did not confer jurisdiction over the corporation. Likewise, *Goldey vs. Morning News,* 156 U. S. 518, 15 Sup. Ct. 559, is entirely inapplicable because the officer served was not in the state on the corporation's business and the corporation transacted no business and had no property in the state, and the service was tested by the federal service statute.

Not one of all those federal cases petitioner relies upon attempts to limit the power of the states to define what constitutes sufficient doing business in the state by an unlicensed foreign corporation to subject it to service of process in the state. None of them held that the state may not provide that one transaction within the state shall make the corporation amenable to the jurisdiction of the state.

V.

The Fact That the Cause of Action May Have Arisen Out of a Transaction Outside the State Does Not Affect the State's Jurisdiction.

Even though the cause of action of Katherine Gold and the other Wisconsin bondholders may have arisen out of transactions outside the state (appellant's contention, Appellant's Brief, pp. 40-41, but not necessarily true and not determined), that does not constitutionally prohibit the State from asserting jurisdiction over a foreign corporation coming into the State for the purpose of settling or dealing with the subject matter of a cause of action in favor of a resident of the state. In a note on this precise question in 30 *A. L. R.* 258 the annotator says:

> "By the great weight of authority the mere fact that the cause of action arose, or the transactions giving rise to it occurred, beyond the territorial limits of the state of suit, does not prevent effective service of process upon an actual agent of a foreign corporation, if the conditions of service are otherwise satisfied." (Citing scores of cases including *New England Mut. L. Ins. Co. vs. Woodworth,* 111 U. S. 138, 4 Sup. Ct. 364; *New York, etc. R. Co. vs. Estill,* 147 U. S. 591, 13 Sup. Ct. 444; *Barrow S. S. Co. vs. Kane,* 170 U. S. 100, 18 Sup. Ct. 526; *Atchison, etc. R. Co. vs. Sowers,* 213 U. S. 55, 29 Sup. Ct. 397; *Washington etc. R. Co. vs. Real Estate Trust Co.,* 238 U. S. 185, 35 Sup. Ct. 818; *Canadian, etc. R. Co. vs. Eggen,* 252 U. S. 553, 40 Sup. Ct. 402, and many inferior federal court cases and scores of

decisions of state courts of last resort and England and Canada.)

In Hunter vs. Mutual Reserve Life Ins. Co., 218 U. S. 586, 31 Sup. Ct. 127, this court held that a corporation may be doing business in a state of a kind and to an extent which will make it liable to suit by residents of that state, although immune to suit by non-residents.

The entire contention of appellant that a non-licensed foreign corporation is not subject to the jurisdiction of this state where the cause of action arises out of a transaction in another state is fallacious. That argument is based upon a misconception of the cases cited by appellant on this subject. Cases like *Old Wayne Mutual L. Ass. vs. McDonough,* 204 U. S. 8, 27 Sup. Ct. 236; *Mitchell Furniture Co. vs. Selden Co.,* 257 U. S. 213, 42 Sup. Ct. 84, and *Louisville & N. R. Co. vs. Chatters,* 279 U. S. 320, 49 Sup. Ct. 329, merely held that the implied assent of a foreign corporation transacting business in a state without complying with the statutes of the state requiring foreign corporations, as a condition of doing business in the state, to appoint some state officer as the corporation's agent for service of process in a suit against the corporation in such state, *involving business transacted in such state,* does not extend to causes of action arising outside of the state. Such cases are entirely inapplicable to the case at bar, because in those cases the service attempted to be made was not upon an actual officer of the corporation, but upon some state officer who was appointed by the state statute—an *imputed or constructive agent created by statute.* Those decisions are based upon the *limited service allowed by the statutes themselves.* The statutes in those cases, like *Wis.*

Stats., Section 262.09(13), either expressly or by local construction, authorized service upon the corporation by serving a state officer *only when the cause of action arose out of business transacted in the state, or the corporation had property in the state.* The Wisconsin Statute permits service ~~also~~ when the cause of action is in favor of a Wisconsin resident, when service can be had on an actual officer of the corporation.

This court has expressly held that even where substituted service is thus made upon an imputed or constructive agent, it may apply to causes of action arising out of transactions without the state, where the service statute expressly or by local construction authorizes service in such cases, and such statute is valid and does not violate due process.

Pennsylvania Fire Ins. Co. vs. Gold Issue, M. & M. Co., 243 U. S. 93, 37 Sup. Ct. 344.

Louisville & N. R. Co. vs. Chatters, 279 U. S. 320, 49 Sup. Ct. 329.

This limitation upon those cases is clearly pointed out in a leading case, *Lipe vs. Carolina C. & O. R. Co.,* 123 S. C. 515, 116 S. E. 101, 30 A. L. R. 248, where this question was squarely decided and it was held that an unlicensed foreign corporation doing business in the state was subject to suit therein by a resident of the state upon a cause of action arising in another state. The court said (30 *A. L. R.* 253):

> "In either case jurisdiction is made to depend upon the constructive, not the actual presence of the corporation within the state's borders, by virtue of a state statute imputing to the corporation a technical presence for the purpose of appointing a process agent or of failing to appoint one. Where jurisdiction is attributed to such constructive presence,

and is acquired by service of process upon one whose power to bind the corporation with respect to process is derived solely from a state statute imputing such authority, the jurisdiction of the state courts will not be extended to causes of action based on transactions outside of the state. And that, as we apprehend, is as far as the authority of the decisions cited and relied upon by appellant may be held to extend.

"But we are concerned here, not with the constructive presence of the defendant corporation, but with its actual presence in the state; not with the effect of service of process upon constructive agents, but upon actual agents within the jurisdiction of the court issuing the process."

The court further said (30 *A. L. R.* 254):

"The power of the state 'to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the state is not open to question. See Missouri P. R. Co. vs. Clarendon Boat Oar Co., 257 U. S. 533, 66 L. ed. 354, 42 Sup. Ct. Rep. 210; Best vs. Seaboard Air Line R. Co., 72 S. C. 482, 52 S. E. 223; 14a C. J. 1384, sec. 4100."

It is the settled rule in Wisconsin by the decision of *American Food Products Co. vs. American M. Co.,* 151 Wis. 385, 396, 138 N. W. 123, that the fact that the contract upon which the unlicensed foreign corporation was sued was made or was to be performed outside the state does not prevent effective service of process upon an actual agent of the corporation, where the other requisites of the statute were satisfied. The Wisconsin court has even gone further than that in *Eingartner vs. Illinois Steel Co.,* 94

Wis. 70, 68 N. W. 664, and *State, ex rel Smith vs. Belden*, 205 Wis. 158, 236 N. W. 542, where it was held that the courts of Wisconsin have jurisdiction to entertain a transitory action arising in another state. even though both parties are nonresidents of the state, under Article IV, Section 2 of the United States Constitution, providing that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

Hence the fact that the cause of action may have arisen out of a transaction outside of the state did not prohibit the state from taking jurisdiction.

VI.

A Foreign Corporation Is Amenable to Service of Process by Service on Its Officer Within the State Where It Is Doing Business Within the State by a Subsidiary Corporation.

Appellant argues (Appellant's Brief, pp. 48-50) that doing business in a State by a subsidiary corporation does not constitute doing of business by a parent corporation. That statement is too broad. Judge Gregory found that appellant was doing business in Wisconsin through a wholly owned and controlled subsidiary, Consolidated Selling Co. Inc., and that Mr. Rupprecht was in Wisconsin on the business of the appellant with several of its customers in Wisconsin (R. 35). Mr. Rupprecht's affidavit admits that Consolidated Selling Co. Inc. is a wholly owned and controlled subsidiary of appellant which is doing an interstate commerce business within Wisconsin (R. 7), and Judge Gregory found on the undisputed affidavit of Mr. Gold that Mr. Rupprecht stated he was in Wisconsin on the business of appellant with several of its Wisconsin customers (R. 35).

While it is not necessary to resort to the appellant's doing business in Wisconsin through its subsidiary corporation in order to sustain the service, nevertheless the appellant's selling activities in Wisconsin, through its wholly owned and controlled subsidiary, constituted "*conducting any business*" in Wisconsin, and subjected the parent corporation to service of process in Wisconsin when an officer of the parent corporation came to Wisconsin on the parent company's business.

The fact that the subsidiary corporation's business in Wisconsin was interstate in character is immaterial.

It is well settled that the business upon which service of process upon a foreign corporation may be based includes interstate as well as intrastate business. *Paulus vs. Hart-Par Co.*, 136 Wis. 601, 118 N. W. 248; *Tetley, etc., vs. Rock Falls Mfg. Co.*, 176 Wis. 400, 187 N. W. 204. Even though such business be entirely in interstate commerce. *International Harvester Co. vs. Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944; *Eastman Kodak Co. vs. Southern Photo Co.*, 273 U. S. 359, 47 Sup. Ct. 400, 403.

While the mere doing of business in the state by a subsidiary corporation does not confer jurisdiction on the parent company, yet where the parent company does the business through the agency of the subsidiary company, then the parent company is doing the business in the state and becomes amenable to the service of process in the state if service can be made on an officer of the parent company who is in Wisconsin on the parent company's business, the same as if the parent company were doing business through the agency of a natural person. A corporation may do business through the agency of a subsidiary corporation just as well as through a natural agent.

The cases cited on page 49 of the Appellant's Brief do not sustain its contention. In *Cannon Mfg. Co. vs. Cudahy*,

267 U. S. 333, 45 Sup. Ct. 250; *People's Tobacco Co. vs. Amer. Tob. Co.*, 246 U. S. 79, 38 Sup. Ct. 233; and *Peterson vs. Chicago, etc. R. Co.*, 205 U. S. 364, 27 Sup. Ct. 513, the service was held invalid because the service made was not on an agent of the parent company but the agent served was only an agent of the subsidiary company, and the service statute did not authorize service by serving a copy on an agent of the subsidiary company. The *Cannon* case indicates (45 Sup. Ct. 251) that had the statute authorized service on the parent company by serving an officer of the subsidiary company, a different question would have been presented. The other cases cited on page 49 of Appellant's Brief are not applicable because either the officer served was in the state merely on his private affairs or that question was not involved.

If other activities besides the single transaction sued on are necessary to sustain jurisdiction, then the business done by appellant in Wisconsin through its wholly owned and controlled subsidiary are as much sufficient additional business to support jurisdiction as were the few additional acts in *Commercial Mut. Acc. Co. vs. Davis*, 213 U. S. 245, 29 Sup. Ct. 445 and *Conn. Mut. Life Ins. Co. vs. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308.

Conclusion.

We therefore respectfully submit that there is no substantial federal question involved on this appeal; that the questions raised on this appeal have been decided a number of times against the appellant's contentions and the appeal should, therefore, be dismissed, or the judgment of the Supreme Court of the State of Wisconsin from which this appeal is taken be affirmed. Even if it is considered that there is a substantial federal question involved, we

submit that since process was served upon the president of defendant corporation while he was in Wisconsin on the corporation's business, the service was valid and authorized under the Wisconsin statute and that such service did not deny appellant due process of law. Even if the cause of action be considered as arising out of a transaction outside the state, that does not affect the jurisdiction of the state courts; and that the judgment of the Supreme Court of Wisconsin is right and should be affirmed.

Respectfully submitted,

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Of Counsel.

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CHARLES ELMO

In the Supreme Court of the United States

October Term, 1932.

No. 587.

CONSOLIDATED TEXTILE CORPORATION,
Appellant,

vs.

JOHN J. GREGORY, Judge of the Circuit Court of Milwaukee County,
Respondent.

On Appeal from the Supreme Court of the State of Wisconsin.

SUPPLEMENT TO RESPONDENT'S BRIEF.

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SUPPLEMENT TO RESPONDENT'S BRIEF.

Respondent's counsel were informed by the clerk of this court that this case would be reached for argument on February 17, 1933. We did not receive a copy of appellant's brief until February 13, 1933, although appellant served us with unpaged galley proofs of its brief on February 9, 1933. As a result, respondent's counsel were obliged to prepare the respondent's brief hastily and respondent's brief was served on appellant's counsel on February 15, 1933. Later in the same day the clerk of this court notified us that the case would not be reached for argument until the March assignment. In the haste to prepare the

*Italics herein are ours.

brief timely, we overlooked several matters which may not be serious but which we desire to supply by this supplement.

On page 11 of respondent's brief are cited *Wisconsin Statutes, Sections 293.03, 293.08, 293.10 and 293.12* (found in the official printed edition of the Wisconsin Statutes for the year 1931 at pp. 2129-2130). To permit ready reference to these statutes, we set forth herein those statutory provisions verbatim*.

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* "**293.03 Issues of fact; election cases, trial of.** (1) Issues of fact in any such proceeding instituted in the supreme court shall be tried in the circuit court of the county within which the material facts recited in the relation for the mandamus shall be alleged to have taken place or in such other county as the supreme court, for cause shown, shall, in its discretion, order, and the circuit court before which such issue of fact is ordered to be tried may try the same at a special or a general term and may summon a jury for that purpose and prescribe the manner of summoning the same. And when such writ shall be issued by any circuit court any issue of fact therein may in like manner be tried at a special or general term, and the court may summon a jury in like manner for the trial thereof."

"**293.08 Writs of prohibition, how issued.** Writs of prohibition issued out of the supreme court shall be applied for upon relation or affidavits filed in the same manner as for writs of mandamus; and if the cause shown shall appear to the court to be sufficient a writ shall be thereupon issued, which shall command the court and party to whom it shall be directed to desist and refrain from any further proceedings in the action or matter specified therein until a day therein named to be fixed by the court and the further order of such court thereon; and then to show cause why they should not be absolutely restrained from any further proceedings in such action or matter."

"**293.10 Proceedings on adoption of return.** If the party to whom such writ of prohibition shall have been directed shall, by an instrument in writing to be signed by him and annexed to such return, adopt the same return and rely

The specification of error 1 on page 15 of Appellant's Brief is deceptive in stating that appellant's president was temporarily within the state in its behalf "solely to procure the withholding of judgment in an action pending against it in another state." Appellant's third and fourth assignments of error (R. 3) admit Mr. Rupprecht (appellant's president) came to Wisconsin for the purpose of "compromising" the New York action; and Mr. Rupprecht admits in his own affidavit that he came not only for the purpose of compromising the New York action but to attempt to persuade the Wisconsin bondholders to deposit their bonds with appellant's committee (R. 15). On page 2 of Appellant's Brief in Opposition to Appellee's Motion to Dismiss or Affirm, appellant states "* * * *that the president of the appellant came to the state of Wisconsin for the purpose of settling the claims of the holders of bonds issued by the appellant; that service was made upon the president of the appellant while he was in the state of Wisconsin for the purpose of settling such claims.*" Hence, obviously the statement in appellant's first specification of error that its president was in Wisconsin "solely to procure the withholding of judgment in an action pending

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upon the matters therein contained as sufficient cause why such court should not be restrained, as mentioned in the said writ, said party shall thneeforth be deemed the defendant in such matter; and the person prosecuting such writ may take issue or demur to the matters so relied upon by such defendant; and the like proceedings shall be had for the trial of issues of law or fact joined between the parties and for the rendering of judgment thereupon as in personal actions."

"293.12 **Judgment.** The court, after hearing the proofs and allegations of the parties, shall render judgment either that a prohibition absolute, restraining the said court and party from proceeding in such action or matter, do issue, or a writ of consultation, authorizing the court and party to proceed in the action or matter in question."

against it in another state" is incorrect. Even if that were his sole purpose, there would be no constitutional objection to a state statute permitting service of process upon a corporation by service on its president, who comes into the state on a single business transaction for the corporation. But we call this to the court's attention to show that Appellant's Brief attempts to limit the visit of its president to Wisconsin to a narrower scope than he himself admitted in his own affidavit and which appellant's counsel have heretofore admitted on the record and treated as undisputed.

On page 33 of Appellant's Brief counsel contend that the Wisconsin actions "did not arise out of and were only remotely related to the business which took Mr. Rupprecht to Wisconsin." This contention is directly contrary to the assertion made by Mr. Rupprecht in his affidavit regarding the purpose of his visit to Wisconsin, for in that affidavit he says (R. 13-14):

> "That said Walter L. Gold represents as attorney the alleged owners of $9200 principal amount of the First Mortgage bonds of defendant Corporation, to-wit, Lillie Mock, Cecelia Alshuler, Crowley Co., Inc., Katherine Gold and Walter L. Gold, on whose behalf an action was commenced on January 19, 1931, in the Municipal Court in the city, county and state of New York by one Edythe H. Stegeman against the defendant Corporation to recover the interest due on said bonds on December 1, 1930."

Counsel well know that in the court below they urged that the New York action was on behalf of the Wisconsin bondholders. Now it seems that appellant's counsel feel that it will better suit appellant's purpose to assert the contrary—that the New York action was not concerned with the Wisconsin bondholders and to support this new

and opposite claim, counsel attempt to rely on the statement in Judge Gregory's return (R. 35) wherein he says:

> "said action of Edythe H. Stegeman had nothing to do with this action, or the actions of the other six bondholders aforementioned."

Appellant's counsel misconstrue Judge Gregory's statement. What the judge apparently had in mind was that the Stegeman action was for different coupons from the coupons involved in the actions of the Wisconsin bondholders and that the action was solely in the name of Stegeman. Neither respondent nor the Wisconsin bondholders made any claim that the Stegeman action was not based on coupons which they transferred to Stegeman. The only affidavits on the part of the bondholders are those of Mr. Gold (R. 17) and Mr. Karon (R. 23). In neither of said affidavits is it denied that the Stegeman action was on coupons transferred by the Wisconsin bondholders to Stegeman, and Judge Gregory's return stating that the Stegeman action had nothing to do with the Wisconsin actions was merely to show that the Stegeman action was based on different coupons and there was no duplication of actions on the same subject matter.

Appellant's attorneys assumed that the statements contained in the affidavit of Mr. Gold were true and Judge Gregory found that all the statements contained in the affidavits of Mr. Gold and Mr. Karon were true (R. 34). In Mr. Gold's affidavit it is stated that he (Mr. Rupprecht) "thought it would be to the interest of Edythe H. Stegeman *and the bondholders represented by affiant* (the Wisconsin bondholders), to have the entry of such judgment postponed." Therefore, appellant's claim that the Wisconsin actions were only remotely related to the business

which took Mr. Rupprecht to Wisconsin, is not only contrary to the record but contrary to appellant's admissions.

Respectfully submitted,

GOLD and McCANN,
Attorneys for Respondent.

WALTER L. GOLD,
RAY T. McCANN,
MORRIS KARON,
Of Counsel.

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CHARLES ELMORE C

In the Supreme Court of the United States

October Term, 1932.

No. 587.

CONSOLIDATED TEXTILE CORPORATION,
Appellant,

vs.

JOHN J. GREGORY, Judge of the Circuit Court of Milwaukee County,
Respondent.

On Appeal from the Supreme Court of the State of Wisconsin.

PETITION FOR REHEARING.

GOLD AND McCANN,
Attorneys for Respondent.

WALTER L. GOLD,
RAY T. McCANN,
MORRIS KARON,
Of Counsel.

INDEX.

	Page
tition for Rehearing	1
gument	1-17

TABLE OF CASES.

nk of America vs. Whitney Bank, 261 U. S. 171	11, 14
nk of Augusta vs. Earle, 13 Pet. (U. S.) 519	8
rrow Steamship Co. vs. Kane, 170 U. S. 100	8, 10
istol vs. Brent, 38 Utah 58	16, 17
shel vs. Insurance Co., 15 Serg. R. (Pa.) 173	8
y vs. Essex County Bank, 13 Vt. 97	8
nt vs. West Virginia, 129 U. S. 114	3
stman Kodak Co. vs. Southern P. M. Co., 273 U. S. 359	13
rmers' & Merchants' State Bank vs. Federal Reserve Bank, 286 Fed. 566	17
ant vs. Cananea Copper Co., 189 N. Y. 241	8
een vs. Chicago B. & Q. R. Co., 205 U. S. 530	12, 15
ternational Harvester Co. vs. Kentucky, 234 U. S. 579	10, 11
mes-Dickinson Co. vs. Harry, 273 U. S. 119	11, 14
bbey vs. Hodgdon, 9 N. H. 394	8
arch vs. Eastern R. Co., 40 N. H. 548	8
Queen vs. Middletown Mfg. Co., 16 Johns. (N. Y.) 5, 7	7
ulin vs. Insurance Co., 25 N. J. Law 57	8
rth Mo. R. Co. vs. Akers, 4 Kan. 388	8
ul vs. Virginia, 8 Wall. 168	3
ckham vs. North Parish, 16 Pick (Mass.) 274	7
iladelphia & Reading Ry. Co. vs. McKibbin, 243 U. S. 265	11, 13

Table of Cases—*Continued.*

	Page
People's Tobacco Co. vs. American Tobacco Co., 246 U. S. 79	11, 12
Rosenberg Co. vs. Curtis Brown Co., 260 U. S. 516	11, 14
St. Clair vs. Cox, 106 U. S. 350	8, 9
Wheeler vs. Sohmer, 233 U. S. 434, 439	6

STATUTES CITED.

Compiled General Laws of Florida, 1927, Sec. 4251	6
Code of Georgia, 1911, Sec. 2258	6
Code of Iowa, 1931, Sec. 11072	6
Revised Statutes of Kansas, 1923, Chapter 60, Secs. 2522-2524	6
Compiled Laws of Michigan, 1929, Chapter 266, Sec. 14094	6
Mason's Minnesota Statutes, 1931, Sec. 9231(3)	6
Mississippi Code, 1930, Sec. 4167	6
Revised Statutes of Missouri, 1929, Sec. 728	6
Public Laws of New Hampshire, 1926, Ch. 331, Sec. 13	6
Compiled Statutes of New Jersey, 1910, p. 1653, Sec. 88	6
Compiled Statutes of New Mexico, Ch. 32, Sec. 196	6
North Carolina 1931 Code, Sec. 483	6
South Carolina Code, 1922, Sec. 390 of Code of Civil Procedure	6
Compiled Laws of South Dakota, 1929, Sec. 2336(2)	6
Complete Texas Statutes, 1928, Sec. 2031	6
Compiled Laws of Utah, 1917, Sec. 6548	6
Official Code of W. Virginia, 1931, Sec. 14, p. 1361	6
Wisconsin Statutes of 1931, Sec. 262.09(13)	6

TEXTS CITED.

	Page
Angell & Ames, Corporations, Chapter 10, Sec. 12	8
18 Fletcher on Corporations, Sec. 8636 (1931 Ed.)	7
18 Fletcher on Corporations, p. 112 (1931 Ed.)	10
18 Fletcher on Corporations, p. 115 (1931 Ed.)	17
Judicial Code, Sec. 51—	
28 U. S. C. A., Sec. 112	14, 15
28 U. S. C. A., Sec. 112, note 16	15

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On Appeal from the Supreme Court of the State of Wisconsin.

PETITION FOR REHEARING.

Now comes the respondent, John J. Gregory, by his counsel, and presents this, his petition for rehearing of the above named cause, and in support thereof respectfully shows:

We are not conscious that our views are colored by the intensity which often attends sustained advocacy of a given cause. For even were respondent to prevail, Katherine Gold, the party in interest, would not necessarily

* Italics ours, unless otherwise stated.

benefit financially by the decision. Though she may obtain judgment in Wisconsin, she would still have to go elsewhere to collect, for the appellant corporation claims it has no property in Wisconsin (R. 5).

The importance of the principle involved in this case to the general public far outweighs its importance to the parties. We believe that the case, by reason of its far-reaching importance, merits further consideration.

This court now, for the first time, lays down the broad rule that the due process clause of the Fourteenth Amendment prohibits a state from enacting legislation authorizing its courts to assert jurisdiction over foreign corporations coming within its borders on a single transaction—even when the subject matter of the suit is that very transaction.

We urge this court to reconsider this question from a more fundamental standpoint, because we believe justice demands it. This nation is going through a period when corporate privileges are being curbed at imperative public demand. The reasons for such demand are too well known to require discussion and no one can deny that the demand is just.

We submit that this decision is a step backward, for it grants foreign corporations a privilege and an immunity which individuals do not enjoy. When an individual person comes into a foreign state, he carries with him all his personal liabilities, and he may be served with process there. There is no reason why a corporation should be entitled to any greater exemption when it comes into a foreign state through one of its chief executive officers to transact some corporate business—even though a single transaction.

Since *Paul vs. Virginia,* 8 Wall. 168, held that a corporation was not a citizen, all kinds of discriminations have been permitted against corporations that would not be allowed against individuals under the equal privileges and immunities clause of Article IV, Section 2, United States Constitution. Hence, it seems paradoxical that a corporation may not be served where an individual may.

We submit that there is no justifiable potency in the due process clause that can logically permit a foreign corporation to come into a State with regard to a transaction and yet insulate itself from the process of the State courts, when the transaction cannot be adjusted, and a citizen of the state attempts to sue the corporation on that transaction. Surely it was never the intention of the framers of the Fourteenth Amendment, nor of the people when they gave their sanction to it, to permit the Fourteenth Amendment to be used as a shield in such cases. In speaking of the due process clause in the Fourteenth Amendment, this court has said:

> "The great purpose of the requirement (of due process) is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." *Dent vs. West Virginia,* 129 U. S. 114, 124.

How can it be said that a statute which attempts to sustain the state's jurisdiction over a foreign corporation when it comes into the state through its chief executive officer to adjust a controversy is a denial of due process of law, when concededly it would be entirely consistent with due process for the state to take jurisdiction in an action against an individual who came into the state to adjust a controversy?

The New York action and the Wisconsin actions arose out of the same subject matter, and Rupprecht, appellant's president, was sent by the corporation into Wisconsin to negotiate with regard to that subject matter—to dissuade the entry of judgment in the New York action and to persuade the Wisconsin bondholders to deposit their bonds. If the corporation had been successful, the result would have been a disposition of the controversy. To say that it is a denial of due process to compel the corporation to litigate in Wisconsin the claim of the Wisconsin bondholders after the corporation has come into the state through its chief executive officer to attempt to dispose of the controversy, and compel those bondholders to go to New York or Delaware to sue the corporation, seems to us to impose a hardship on Wisconsin bondholders which is not justified by the requirements of due process.

The very fact that the validity of service of process on a foreign corporation is to be determined by the particular facts of each case as to the amount of business done, indicates, it seems to us, that it is an unsound rule when applied as a constitutional requirement. The difficulty to apply the rule results in injustice to creditors of foreign corporation. Such a rule makes for uncertainty in the law and enables foreign corporations to take their creditors from one court to another up to the highest court in the land merely to test the question of service. No such indefinite rule should be tolerated unless inevitable, and we submit that there is neither necessity nor justification for such indefiniteness.

We do not ask for an all-inclusive definition of "due process" as applied to service on foreign corporations, but we do say that to determine whether due process is denied a foreign corporation it should be sufficient merely to determine whether or not the officer served was in the state on corporate business, even though on a single transaction.

Such a rule would be logical. The simple test should be: "Is the corporation in the state through an authorized officer to deal with the particular transaction out of which the suit arises?" If it is, due process cannot be said to be violated when that officer is served with process to litigate the subject matter of the transaction concerning which he was sent into the state on behalf of the corporation.

Not a single satisfactory reason has been given in any case to indicate just why service on an officer who comes into the state on a single transaction is a denial of due process of law, but not when there has been a series of transactions. No reason has been given for the distinction between a single transaction and a number of transactions. What constitutional efficacy is there in a number of transactions that one transaction does not possess? A corporation sending its chief executive officer into a state for a single transaction is present in the state so far as that transaction is concerned just as much as if it came into the state a thousand times on other transactions, because as to that transaction *it is present there* and it could not act more fully concerning that transaction than if it were domiciled in the state.

It seems clear to us that a corporation is present in a state insofar as the particular transaction is concerned when the corporation sends an officer into the state's territorial limits on that particular corporate business. This decision fails to recognize what, we submit, is an inescapable fact that if the business done in the state consist of an isolated transaction, the corporation is entirely present in the state for the purpose of that transaction, even though it may not be present outside of that transaction.

This decision is contrary to the general trend of legislative[1] thought on the subject of jurisdiction over foreign corporations. When at least 18 states permit service of process when the officer is in the state on a single transaction, that form of procedure is remarkably wide-spread considering the variety of the process service statutes. Now, it seems to us that a form of procedure so general that it exists in 18 states, can hardly constitute a denial of due process of law.

> "It would be an extraordinary deduction from the 14th Amendment to deny the power of a state to adopt the usages and views of business men in a statute on the ground that it was depriving them of their property without due process of law." *Wheeler vs. Sohmer,* 233 U. S. 434, 439.

While the universality of a statute affecting substantive rights may not be a ground for conceding it to afford due process, the universality of a procedural statute would

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1. The statutory provisions of the various states for the service of process on foreign as well as domestic corporations differ considerably. But at least the following states, 18 in number, have statutory provisions which are basically similar to that of **Wis. Stats., section 262.09(13)** (official printed edition of the Wisconsin Statutes for the year 1931, pages 1970-1) and seem to permit service of process when the officer comes into the state on a single transaction:

Compiled General Laws of Florida, 1927, Sec. 4251;
Code of Georgia, 1911, Sec. 2258;
Code of Iowa, 1931, Sec. 11072;
Revised Statutes of Kansas, 1923, Chapter 60, Secs. 2522-2524;
Compiled Laws of Michigan, 1929, Chapter 266, Sec. 14094.
Mason's Minnesota Statutes, 1931, Sec. 9231(3);
Mississippi Code, 1930, Sec. 4167;
Revised Statutes, Missouri, 1929, Sec. 728;
Public Laws of New Hampshire, 1926, Chap. 331, Sec. 13;
Compiled Statutes of New Jersey, 1910, p. 1653, Sec. 88;
Compiled Statutes of New Mexico, Chap. 32, Sec. 196;
North Carolina 1931 Code, Sec. 483;
South Carolina Code, 1922, Sec. 390 of Code of Civil Procedure;
Compiled Laws of South Dakota, 1929, Sec. 2336(2);
Complete Texas Statutes, 1928, Sec. 2031;
Compiled Laws of Utah, 1917, Sec. 6548;
Official Code of W. Virginia, 1931, Sec. 14, p. 1361;
Wisconsin Statutes, Sec. 262.09(13).

seem to be very strong evidence that it does afford due process. For what does the due process clause applied to procedural matters insure but to be adjudged according to the laws of the land, fairly applied?

This decision is contrary to the general trend of judicial[2] thought on the subject of jurisdiction over foreign corporations.

A brief reference to the historical background of the subject of jurisdiction over foreign corporations will, we believe, demonstrate a sound cause for reconsideration of the question here involved from a fundamental standpoint.

In order to render a personal judgment a court must get jurisdiction in one of four ways: (1) by presence, (2) by domicile, (3) by allegiance, (4) by consent. A court may obtain jurisdiction of a foreign corporation in only two ways: (1) by its consent, (2) by its presence.

It was thought at common law, until the latter part of the nineteenth century, that service of process on a foreign corporation was impossible because it was said that the corporate officers dropped their official capacity as soon as they left the border of the state of incorporation. *McQueen vs. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5, 7, (1819); *Peckham vs. North Parish*, 16 Pick. (Mass.) 274, 286 (1834); 18 *Fletcher on Corps.*, Sec. 8636 (1931, Ed.).

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2. In **Barrow Steamship Co. vs. Kane**, 170 U. S. 100, 106, it was said:

"The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them."

See also **Grant vs. Cananea Copper Co.**, 189 N. Y. 241.

The reasoning of the cases cited on pages 27 and 28 of the Respondent's Brief in this case, which held that a single transaction was sufficient to authorize the state to adjudica e that transaction, seems to us to be in accord with the aim of the **Barrow** case. Those cases place corporations upon the same footing as natural persons. Those cases give satisfactory reasons for their conclusions, whereas the contrary cases do not.

Seemingly the only difficulty felt by the courts was that of service, since none of the cases seemed to doubt that once that difficulty was removed the courts had power to render a personal judgment. *Bushel vs. Insurance Co.*, 15 Serg. R. (Pa.) 173, 176 (1827); *Angell & Ames, Corporations,* Chapter 10, Section 12. That doctrine, however, was breaking down and the weight of authority taking a more liberal and sounder view in favor of jurisdiction (for in *Libbey vs. Hodgdon,* 9 N. H. 394 (1838); *Day vs. Essex County Bank,* 13 Vt. 97 (1841); *Moulin vs. Insurance Co.,* 25 N. J. Law 57 (1855); *March vs. Eastern R. Co.,* 40 N. H. 548, 577 (1860); *North Mo. R. Co. vs. Akers,* 4 Kan. 388 (1868), personal judgments were rendered against foreign corporations doing business within the territory without the consent of the corporation to the jurisdiction of the courts). In the meantime the dictum of Chief Justice Taney appeared in *Bank of Augusta vs. Earle,* 13 Pet. (U. S.) 519, 558 (1839), in which he said:

> "* * * a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

Doubtless everyone now concedes that Chief Justice Taney's concept of a corporation was erroneous, but his dictum arrested the development of the sounder doctrine for some time. However, that error, so far as service of process is concerned, was pointed out in the leading case of *St. Clair vs. Cox,* 106 U. S. 350. In that case this court reviewed the history of judicial thought on the subject of service of process on foreign corporations. The court pointed out (106 U. S. 354) that the reason it was at

first conceived impossible that a corporation could be sued upon a personal demand outside the state of its incorporation was based on the doctrine that a corporation had to dwell in the place of its creation and could not migrate to another sovereignty, coupled with the further doctrine that corporate officers did not carry their functions with them when they left the state of incorporation. Actions against foreign corporations were confined to the disposition of such property of the corporation as could be found in the state and even as to such actions enabling legislation was necessary. This obvious injustice, the court said (106 U. S. 355) was finally remedied by legislation. In discussing the validity of service of process on foreign corporations under enabling statutes, the court said (106 U. S. 356) that such legislation satisfied constitutional reqirements so long as it did not encroach upon that principle of natural justice "which forbids condemnation without opportunity for defense"; "which requires notice of a suit to a party before he can be bound by it. It must be reasonable and the service provided for should be only upon such agents as may be properly deemed representative of the foreign corporation."

St. Clair vs. Cox, 106 U. S. 350, did not require that the corporation carry on business within the state to make the service constitutionally valid. That case merely required that service be made on such agent of the corporation as to reasonably assure the corporation of notice of the commencement of suit. Clearly this requirement can be as well met when the corporate officer is in the state on one transaction as on a thousand transactions.

We therefore see that it was by legislation that an injustice was removed and the legislation was declared valid even though before such legislation was enacted this court

considered it impossible for a state to acquire jurisdiction over a foreign corporation. The change in thought was brought about by necessity—changing business conditions. An injustice was remedied by legislation which a generation before would have been considered unconstitutional in absence of economic conditions which demanded the change.

After the reasonableness and necessity of such legislation was accepted, it was held that corporations were suable in foreign states even in absence of enabling legislation. *Barrow Steamship Co. vs. Kane,* 170 U. S. 100. Thus there came about a complete reversal of judicial opinion because the courts came to realize that it was reasonable and just that foreign corporations should be suable wherever service could be obtained upon them.

A much debated and conflicting question then arose: Under what circumstances might service be made on foreign corporations? The first theory was the fictitious "consent" doctrine. 18 *Fletcher Corps.,* p. 112 (1931 Ed.) However, in *Barrow Steamship Co. vs. Kane,* 170 U. S. 100, the contention that the foreign corporation's express or implied consent was necessary to sustain jurisdiction was overruled. And the last blow to the theory of the necessity of consent seems to have been administered by *International Harvester Co. vs. Kentucky,* 234 U. S. 579.

The second and present theory of jurisdiction over foreign corporations is the "presence in the state" doctrine. There is nothing in the due process requirement of the Fourteenth Amendment that can justify a requirement that as a condition of a state asserting jurisdiction over a foreign corporation the corporation's "presence" in the state must be a presence manifested by a continuous course of business in the state, in absence of such definition of

the term in the particular process service statute that may be involved. We do not claim that when a foreign corporation sends its chief executive officer into the state for a single transaction it is generally within the state; but we do claim that *it is present* in the state as to that particular transaction. Otherwise, a corporation could insulate itself as to a part of a transaction and claim that beyond that part the corporation is not in the state. Due process does not require that a foreign corporation have such a privilege. If a corporation may thus insulate itself, it could make the unreasonable claim of freedom from service outside of its regular business hours.

The decision in this case is predicated upon the following cases:

International Harvester Co. vs. Kentucky, 234 U. S. 579;

People's Tobacco Co. vs. American Tobacco Co., 246 U. S. 79;

Philadelphia & Reading Ry. Co. vs. McKibbin, 243 U. S. 265;

Rosenberg Co. vs. Curtis Brown Co., 260 U. S. 516;

Bank of America vs. Whitney Bank, 261 U. S. 171;

James-Dickinson Co. vs. Harry, 273 U. S. 119.

We wish to point out that these cases are based essentially on the construction of various process service statutes and not on the requirements of due process of law.

In the *Harvester* case jurisdiction of the state court was sustained. The case involved review of a judgment of the Court of Appeals of Kentucky and while the service must have been based on a state service statute, the provisions

of that statute do not appear in the opinion. The case cited *Green vs. Chicago B. & Q. R. Co.*, 205 U. S. 530, where the service was set aside. The *Green* case was commenced in the federal court and the validity of the service depended on the federal process service statute. The service was set aside not on the ground of due process, because due process is not mentioned in the opinion, but because there was no compliance with the federal statute which required the defendant to be a resident of the district to be subject to suit there. The *Green* case is apparently the first case where the test of "presence" was used to determine the existence of jurisdiction. But this test was based on the federal service statute not on due process of law as is evident from the language in the opinion (205 U. S. 532):

> "The jurisdiction of the circuit court in this case was founded solely upon the fact that the parties were citizens of different states. In such a case the suit may be brought in the district of the residence of either. Act of March 3, 1875, chap. 137, sec. 1 (18 Stat. at L. 470, chap. 137), as corrected by act of August 13, 1888, chap. 866, sec. 1 (25 Stat. at L. 434, U. S. Comp. Stat. 1901, p. 508). But to obtain jurisdiction there must be service, and the service was upon the corporation in the eastern district of Pennsylvania. Its validity depends upon whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that, through its agents, it was present there."

People's Tobacco Co. vs. American Tobacco Co., 246 U. S. 79, was commenced in federal court and the service was tested by the federal statute—the venue provision under the Sherman Anti-Trust Act. Section 7 of the Sherman Act provided that suits of the character there involved might be brought in the district in which defendant "resides or is found." The decision was based on the requirements of this statute and on the further fact that the per-

son served was not an agent of the defendant at the time of service. That the case was based on construction of a statute and not on due process is apparent from the fact that in *Eastman Kodak Co. vs. Southern P. M. Co.*, 273 U. S. 359, service under similar facts as in the *People's Tobacco* case was sustained, although the amount of business done in the district would not have been sufficient to sustain service under the statute involved in the *People's Tobacco* case. The difference in the result in the *Eastman* case from that in the *People's Tobacco case* was that the process service provision of the statute had in the meantime been amended by the Clayton Amendment to the Sherman Act. As the court said in the *Eastman* case (273 U. S. 372-3) the necessary effect of the Clayton Amendment to the Sherman Anti-Trust Act

> "was to enlarge the local jurisdiction of the district courts so as to establish the venue of such a suit, not only, as theretofore, in a district in which the corporation resides, or is found, but also in any district in which it 'transacts' business, although neither residing nor found therein."

The *Eastman* case holds that the amount of business necessary to be done so that the corporation may be said to "reside" or to "be found" in the state is much more than the amount required in order to constitute "transacting business" in the state. Here then is a case which holds that it is within the power of the legislative body to change the requirements for valid service on foreign corporations.

In *Philadelphia & Reading Ry. Co. vs. McKibbin*, 243 U. S. 265, the director served was not in the state on corporate business, hence there could be no valid service at all. The case was commenced in federal court and relies on the *Green* case and hence is necessarily based on construction of the federal service statute.

Rosenberg Co. vs. Curtis Brown Co., 260 U. S. 516, was commenced in a New York state court and was removed to the federal court. The service seems to have been tested on a basis of statutory construction and the service statute regarded as being the same as the federal service statute, for the decision was predicated upon the idea that the corporation had to be "present" or "found" in the state (see last paragraph of the opinion). The words "present" or "found" appear to be the requirements of the federal service statute, *Judicial Code*, section 51 (28 U. S. C. A., section 112) or the service provisions under the Sherman Anti-Trust Act. Furthermore, the New York statute required that to be amenable to state process, a foreign corporation had to be "doing business" in New York, *(New York Code of Civil Procedure*, section 1780 (4)) and the *Rosenberg* case, if it considered the state service statute at all (the opinion does not mention the state service statute), construed the requirement of "doing business" to mean more than occasional isolated transactions.

Bank of America vs. Whitney Bank, 201 U. S. 171, was commenced in the federal court and hence the service was tested by the federal statute. The court said (261 U. S. 172):

> "The sole question for decision is whether, at the time of the service of the process, defendant was doing business within the district in such manner as to warrant the inference that it was *present* there."

The case then cites the *McKibbin and Rosenberg* cases. Then again, at 261 U. S. 173, the opinion says:

> "That the defendant was not in New York, and hence was not *found in the district* is clear."

James-Dickinson Co. vs. Harry, 273 U. S. 119, was commenced in an Illinois state court and removed to the

federal court. The Illinois service statute is not mentioned in the opinion but apparently the validity of the service was tested on a basis of statutory construction and the service statute regarded as though it were the same as the federal service statute. For it said in the opinion (273 U. S. 122):

> "Jurisdiction over a corporation of one state cannot be acquired in another state or district in which it has no place of business and *is not found* * * *"

(citing the *McKibbin, Rosenberg* and *Whitney Bank* cases.)

In all the foregoing cases the words used are "present" or "found" in the district or state. Where did these words come from? The words "present there" were first used in *Green vs. Chicago B. & Q. R. Co.*, 205 U. S. 530. That case was speaking of the federal service statute there mentioned which provided that in case of diversity of citizenship "suit may be brought in the district of the residence of either" party. The present federal jurisdiction and venue statute is Judicial Code, section 51 *(28 U. S. C. A., section 112)* which provides:

> "No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The earlier statute (R. S., section 739) also contained after the word "inhabitant"— "or in which he shall be found." See *28 U. S. C. A. 112, note 16.*

Some of the cases above cited arose under special statutes such as the Sherman Anti-Trust Law which contains

its own jurisdiction and venue provision. It seems to us, therefore, that the cases upon which this decision is founded clearly show that they are based on statutory service requirements and not on due process of law. The words "present" or "found" in the district are derived from construction of federal service statutes. That this is so was gradually lost sight of in the cases and the phrase "present" or "found" in the district was repeated so often in cases which properly involved only *statutory construction* that the rule seems by imperceptible degrees to have now been changed into a rule of due process.

While, of course, it is not binding upon this court, the reasoning of the court in *Bristol vs. Brent,* 38 Utah 58, seems to us most persuasive. That court said *(38 Utah 64):*

> "Some of the courts have been too much impressed with the rule existing at common law, namely, that a corporation cannot migrate and hence is to be served with legal process only at the place where it was created, and hence these courts have placed a rather strict construction upon statutes (authorizing service). * * * The character of such agents and the manner of making service of legal process upon a foreign corporation must, to a large extent at least, be left to the sound discretion of the legislative power. So long as notice to corporations amounts to due process of law, the mere manner of service or the agent served is not of controlling importance. The only legal question really involved is whether the agent served is one who is directly connected with the corporate affairs, or is conducting some of its corporate business, so that through him the corporation is legally represented. If such be the case, we cannot see that *the nature or the amount* of business that an agent transacts in the foreign state is of great importance." * * *

And again (38 Utah 67):

> "If the person who is designated as agent is in fact the representative of the corporation, we cannot see how it is of controlling importance to *what extent* or *in what particular manner* the agent represents the company, provided the statute authorizes service upon such a person or agent."

The reason corporations ever came to be suable in foreign jurisdictions was that it appeared that it was reasonable and just that they should be subject to suit in places where they voluntarily engaged in business. *In the last analysis the test of jurisdiction is the determination of the reasonableness of its exercise. Farmers' & Merchants' Bank vs. Federal Reserve Bank,* 286 Fed. 566, 577, 588; 18 *Fletcher on Corporations,* p. 115 (1931 Ed.). We submit that it is only reasonable and just that when a corporation sends its chief executive officer into a state for even a single transaction the corporation is present in the state as to that ransaction and should there be amenable to suit as to that transaction by service on such officer. We therefore respectfully request a rehearing in this cause so that further consideration may be given to the far-reaching principle here involved, and the judgment below affirmed.

Respectfully submitted,

GOLD and McCANN,
Attorneys for Respondent.

WALTER L. GOLD,
RAY T. McCANN,
MORRIS KARON,

We, Walter L. Gold, Ray T. McCann and Morris Karon, counsel for the above-named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WALTER L. GOLD,
RAY T. McCANN,
MORRIS KARON,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 587.—October Term, 1932.

Consolidated Textile Corporation, Appellant, *vs.* John J. Gregory, Judge of the Circuit Court of Milwaukee County.	Appeal from the Supreme Court of the State of Wisconsin.

[April 10, 1933.]

Mr. Justice McReynolds delivered the opinion of the Court.

By an original proceeding in the Supreme Court of Wisconsin appellant unsuccessfully sought a writ commanding the Judge of the Circuit Court of Milwaukee County to desist from further proceedings in the cause instituted against it by Katherine Gold to recover principal and interest of certain bonds then in default. The petition disclosed the circumstances under which the original summons and complaint were served upon the president of the corporation and alleged that although the Circuit Court had not acquired jurisdiction it was about to enter judgment contrary to the inhibition of the XIV Amendment.

An alternative writ issued. The trial Judge—appellee here—made a return in which he incorporated the evidence relied on to sustain his conclusion that jurisdiction had been acquired through service of summons as authorized by statute. The Supreme Court ruled that the statute—Wisconsin Statutes, (1931) Sec. 262.09—had been properly construed and applied; also that there was nothing to show conflict with the Federal Constitution. Accordingly the prayer for relief was denied. The validity of the statute was adequately challenged; the matter is here by appeal.

In the circumstances we must ascertain for ourselves the facts disclosed by the record. *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 265; *Truax* v. *Corrigan*, 257 U. S. 312, 324, 325. These appear from the pleadings and three affidavits presented in the trial court on the motion to vacate service of the summons—one

by Frederick Rupprecht in support of the motion and two in opposition by Walter L. Gold and Morris Karon.

It appears:

The Consolidated Textile Corporation is organized under the laws of Delaware. It has never been licensed to do business in Wisconsin; has no place of business or property therein, and no officer or agent is stationed in that State. Its principal place of business is New York City and its president, Frederick K. Rupprecht, resides there.

In 1921 the Corporation issued and sold a series of twenty-year, 8% bonds, with interest coupons payable semi-annually. Coupons due December 1, 1930, and thereafter were not paid. A Bondholders' Committee received on deposit 70% of the outstanding bonds.

Walter L. Gold, an attorney with offices in Milwaukee, Wisconsin, and others represented by him, owners of $9,200 of these bonds, declined to deposit them with the Committee and caused suit to be brought in the Municipal Court, New York City, to recover interest which fell due December 1, 1930. In that suit motion for summary judgment was granted.

Rupprecht, President of the Corporation, believing that the interest of all bondholders would be subserved if final judgment were withheld, by communications sent from New York sought a conference with Gold at Milwaukee for the purpose of acquainting him with the facts and dissuading him from permitting final judgment. He with reluctance, assented. With the sole purpose of engaging in such conference and without intending to submit the Corporation to the jurisdiction of the State of Wisconsin, Rupprecht went to Gold's law office in Milwaukee on the morning of January 14, 1932. His intention was to discuss the New York suit and to present facts which he believed would cause Gold to withhold final judgment in the New York case and agree to deposit his own bonds and recommend the deposit of others with the Bondholders' Committee.

During an interview lasting one and one-half hours in the attorney's office sundry matters relating to the Corporation's affairs were discussed. While there Rupprecht was served with summonses (also complaints) addressed to the Corporation commanding that it appear and answer in separate actions instituted by Katherine Gold and six others to recover upon certain of the above-

described bonds and interest—all of whom Gold represented. In anticipation of Rupprecht's arrival in Milwakuee the summonses and complaints had been prepared.

In his affidavit Gold stated that he had "been informed that through Consolidated Selling Co., Inc., which is the selling agency for Consolidated Textile Corporation and is a subsidiary wholly controlled by Consolidated Textile Corporation and is an agent of Consolidated Textile Corporation, the Consolidated Textile Corporation sells goods in Wisconsin, to-wit: to Gimbel Bros. in Milwaukee and Sears, Roebuck & Co., in Milwaukee."

The unimportance of the statement concerning acts of the controlled corporation — Consolidated Selling Company — is clear enough in the light of what we said in *Cannon Mfg. Co.* v. *Cudahy Co.*, 267 U. S. 333, 336, 337.

In order to hold a foreign corporation not licensed to do business in a State responsible under the process of a local court the record must disclose that it was carrying on business there at the time of attempted service. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 583, 585.

"The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted." *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 87.

Opinions here in recent causes sanctioning and applying this general rule show plainly enough, we think, that the appellant Corporation was not present within the jurisdiction of Wisconsin as required. *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 265; *Rosenberg Co.* v. *Curtis Brown Co.*, 260 U. S. 516; *Bank of America* v. *Whitney Bank*, 261 U. S. 171, 173; *James-Dickinson Co.* v. *Harry*, 273 U. S. 119, 122.

The judgment of the court below must be reversed. The cause will be remanded there for further proceedings not inconsistent with this opinion.

Reversed.

END OF CASE